No. 91-7094

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WILLIE LEE RICHMOND,
Petitioner,

v.

SAMUEL A. LEWIS, Director,
Arizona Department of Corrections, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 15, 1992
CERTIORARI GRANTED MARCH 30, 1992

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CHRONOLOGICAL LISTING OF RELEVANT DATES

August 26, 1973	—Bernard Crummett killed.
September 21, 1973	—Information filed.
January 15, 1974	—Trial commences.
February 5, 1974	—Jury verdict returned.
February 25, 1974	—First mitigation hearing commences.
February 27, 1974	—Trial court imposes sentence of death.
December 20, 1976	—Arizona Supreme Court affirms.
April 21, 1978	—U.S. District Court vacates death sentence.
March 13, 1980	—Trial court reimposes sentence of death.
May 12, 1983	—Arizona Supreme Court affirms on second appeal.
November 14, 1983	—Certiorari denied on second appeal.
July 11, 1986	—U.S. District Court dismisses habeas petition.
December 26, 1990	—Court of Appeals affirms.
October 17, 1991	—Court of Appeals denies rehearing.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

The 21 day of Sept. 1973

No. A-24252

STATE OF ARIZONA,
Plaintiff,

vs.

WILLIE LEE RICHMOND,
Defendant(s).

INFORMATION

The County Attorney of the county of Pima, in the name of the state of Arizona, and by its authority accuses

WILLIE LEE RICHMOND

and charges that in Pima County:

COUNT ONE
(MURDER—1st degree)

On or about the 26th day of August 1973, WILLIE LEE RICHMOND killed BERNARD THOMAS CRUMMETT in violation of A.R.S. Section 13-451, 13-452 and 13-453.

COUNT TWO
(ROBBERY)

On or about the 26th day of August 1973, WILLIE LEE RICHMOND robbed BERNARD THOMAS CRUMMETT, all in violation of A.R.S. Section 13-641 and 13-643A, as amended.

DENNIS DECONCINI
Pima County Attorney

By /s/ David G. Dingeldine
DAVID G. DINGELDINE
Chief Deputy Atty.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

(Caption Omitted in Printing)

[EXCERPT OF TRIAL TESTIMONY OF DR. JAMES HOLKA, TRANSCRIPT DATED JANUARY 15, 1974, VOL. I]

* * * *

[153] DIRECT EXAMINATION CONTINUED BY MR. HOWARD:

Q I believe the question I asked, Doctor, last was the procedure that you follow in an autopsy and let me be more specific. You make a gross examination of the body before you really do anything, Doctor, in the course of an autopsy?

A Yes. We also examine the effects of—the shoes, the clothing, whatever personal effects are delivered with the body to the morgue facility, and then the body is examined, a gross examination. On occasion, photographs are taken, and on other occasions x-rays of the body are taken. And then the examination is continued by the disection of the body and gross examination of the internal organs follow in which sections [154] of these are made and are preserved and prepared for microscopic examination which follow some days later. And then, at the same time, the gross examination is made the body fluids or foreign substances are removed and held for examination—toxicological examinations or other identification and at a later time, whether the microscopic identification or toxicological these are incorporated into the biological examination.

Q In this particular case you have a copy of that report before you, Doctor, to refer to?

A Yes.

Q What did your gross examination—verbal examination of the body reveal, Doctor Holka?

A There was considerable evidence of compressive fluorescein in the skull with the bursting of skin and antrusion of skull contents that included some fragments of skull which were missing as well as the brain. In addition to these, there were other marks of force applied to the trunk, and these were attended by abrasions and in a linear fashion as well as again a bursting kind of separation of the skin [155] and soft tissue of the extremities. In addition to these, not incurred at this time, but at some time was evidence of surgical intervention on the legs of the victim with numerous suture wounds which were well healed. Also observed was needle puncture marks which was on the right forearm of the victim, the age of which I could not determine because of the other more recent evidence of prior surgery which supervened. This concluded the gross examination prior to this photograph having been taken and x-rays as I described generally.

In the internal examination there was evidence of fractures of the left thorax by possible anterior which were not attended by subcutaneous soft tissue hemorrhage. Similar tissues in the organs of the abdomen or abdominal cavity. There was no significant hemorrhage and for a person for his estimated age, they were consistent with very good health.

There was no evidence of hemorrhage externally into the abdominal cavity or internally into the body wall. Similarity in the upper extremities, these bursting lacerations that I described were not attended by hemorrhage either superficially or deep within the wound. And the [156] abraded surfaces were exuding only a serus type fluid and there was no blood associated with it.

Q And what conclusion, if any, did you draw from the examination of the trunk of the body, the gross examination and the nature of those wounds?

A From the comparison of the external examination with the internal examination, and the absence of evidence of hemorrhage which one would have expected by excessive

force, I made the determination that the victim was probably already dead at the time that those injuries were inflicted to the trunk—were inflicted. That the principal cause of death, was therefore compressive injury to the skull and its contents.

Q Now, you mentioned, Doctor, I think surgical wounds that were well healed in the leg area. Does that—did those wounds tell you anything about this individual? Did you recognize those wounds?

A To my experience in the Air Force, these were the wounds very commonly inflicted by shrapnel.

Q Did you have experience yourself in observing that type of wound when you were in the Air Force?

[157] A Yes.

Q I show you what has been marked as State's Exhibits # 18, 19, and 20, Doctor, and just examine them if you will, and tell me if this is the individual's body upon whom you performed this autopsy?

A Yes.

Q Doctor, were you able to draw any conclusions as to how the crushing injury to the brain and the other injuries to the body—trunk of the body might have been caused?

A I concluded from an examination of the scene, the gross examination of the internal examination, that these were probably a result of excessive force. I would conclude further that this was a wheel of a car.

Q And Doctor, were you able to reach any conclusion as to whether this individual—this individual was run over by a car one time or more than one time?

A I concluded that it was more than one direction of force from the compression marks of the vehicle times body—that these two, at least two directions.

Q And was there anything specific in your evidence, in your internal examination [158] which would support that conclusion?

A Yes, the force applied to the—had been separately applied to the trunk of the body and that was supported by the absence of hemorrhage into the internal organs.

Q Have you explained to the jury why you draw that conclusion from those facts?

A Hemorrhages usually depend upon an act of circulation. That circulation ceases whenever there is an interruption of circulation either because of the interference or on the basis of the heart, the pump or the circulatory system, or because of exanguination or place of last loss of blood from some other site. The place of loss of blood would have been from the skull injury.

Q Did you draw a conclusion, then, from that that the injury to the thoracic cavity is that what I call a broken rib, Doctor?

A Yes.

Q That that injury was sustained most probably after the crash injury?

A Yes, that's right.

Q Now, by the use of any of these photographs, Doctor, # 18, 19, or 20, would you be able to illustrate to the jury, and just answer [159] this question yes or no, what you mean when you say that there were two directions of force indicated in the injuries which led you to the conclusion that the body may have been run over more than one time?

A Yes.

MR. HOWARD: I would move at this time Your Honor, for the admission of State's Exhibit # 18, 19, and 20.

THE COURT: Perhaps it might be necessary to lay foundation. They were taken at the time of the autopsy.

Q Does the body appear here in substantially the same condition it did at the time that you made your gross examination of the exterior of the body?

A That's right.

MR. HOWARD: I believe I did ask him—I move for the admission of State's Exhibits #18, 19, and 20.

THE COURT: Other than the objection already stated, do you have any further objection?

MR. BOLDING: No, no further objection, Your Honor.

THE COURT: ≠ 18, 19, and 20 may be admitted.

[160] Q Doctor, holding those photographs up, you can perhaps illustrate by pointing out the injuries you are referring to, and showing the jury how you drew the conclusion that there is two directions of force illustrated there?

A In the first photograph which gross examination—you will notice that there is a linear direction of force going across the trunk over the left thoracic cavity and abdominal cavity to the right side.

Less clearly established, I think in this photograph, but better seen here is a direction of force.

Q May I interrupt you a minute? The first photograph you are referring to is State's Exhibit ≠ 18 and you are now holding State's Exhibit ≠ 20?

A In ≠ 20 the linear direction of force is in the opposite direction or it intersects the lines of force applied to the trunk and there is a separate direction of force applied to the right shoulder. And if these two lines of force could be projected into space, then the focus would come here at a point where they would intersect and they would not parallel, I should expect from parallel wheels of a car.

[161] And this photograph, ≠ 19, it gives you a little more perspective in the direction of force, which is better seen in the close-up of the lead and posing forces applied to the trunk.

Q Alright. Thank you, Doctor, what were—were there x-rays, Doctor, in this particular case of specifically the lower extremities?

A Yes. I wanted to demonstrate the metallic fragments which I expected to find in the lower extremity.

Q Do the x-rays demonstrate that?

A Yes, they do.

Q Did they demonstrate anything as far as fractures of the lower extremities?

A No, these appeared to be in the soft tissue injuries so far as we could tell at this time.

Q Was there any major trauma found to the lower extremities of the body?

A Recent trauma?

Q Yes.

A Yes. There was lacerations about the knees.

Q Is there anything in your finding, Doctor, inconsistent with the usual findings in a case of a pedestrian being struck by an [162] automobile?

A If by a pedestrian, you mean the deceased was in a position—

Q Walking, yes.

A Yes, usually the lower extremities are fractured and there is considerably more trauma administered to the abdominal cavity, and that would be incurred by a bumper or the proportion of the hood of the car.

Q What, if anything, of significance did the laboratory examination of the tissues in this case reveal?

A The toxicological examination—the only thing of significance that was revealed was the presence of a small amount of alcohol.

Q Would that be significant, Doctor, in terms of possible intoxication?

A It does not reach the definitive limits of intoxication.

Q Was there any evidence of any other type of drugs from the examination of any of these fluids?

A No sir, there was not.

Q Doctor, from your examination at the scene and also from autopsies were you able to reach a conclusion as to the approximate time of [163] death of the victim?

A The approximate time of death was based upon my examination at the scene, and at that time there was only the beginning of rigor mortis and this would be consistent with approximately six hours to the time of death which was inflicted.

Q From the time that you were at the scene, which was approximately what time Doctor?

A I was present at the scene at 7:00 in the morning. That would put the time of death at about one to twelve that preceeding morning.

Q And how definitely is that method of determination?

A That is an approximation. It falls within about two hours. It depends upon the temperature at the scene and various considerably.

Q Could you explain to the jury what rigor mortis is?

A Rigor mortis, it is the stiffening due to the release of enzymes in the muscle, and this is a process of individual cells as the muscle dies these sometimes are released and the stiffening causes contraction of the muscle. They are related to time and proceeds to a point and then relaxation of the same muscle again as decomposition of the muscle occurs. [164] So it is a two-fold process, and we took it approximately twelve hours after death and usually passes at about 24 hours after death. This is somewhat dependent upon temperatures because delay prolonged in cold temperatures can be hastened in hot temperatures.

Q So, depending on what the temperature was during that preceeding however many hours, the state of rigor mortis would differ?

A That's right.

Q Doctor, calling your attention to the—specifically to the head injury and to your procedure with regard to the examination at the autopsy of the head, can you tell how you examined those injuries? In other words, where do you cut? Did you have to cut, or what did you do?

A After the gross external examination the scalp is reflected and the examination of the underlining soft tissue grossly is performed. And that is followed by an incision into the skull, which is partially removed and the internal contents of the skull cavity are then examined grossly and then the brain itself is removed and a microscopic examination of the brain follows.

[165] Q Did you find anything in the course of that procedure which showed you injuries that might have been sustained or which appeared to have been sustained in a different manner other than a crush injury that was previously described?

A Since the victim's skull was in a fragmented condition, the gross examination suggested a different type of injury rather than the bursting injury due to a compressive force. There appear to be a compressed stellic wound over the forehead and the scalp in this area was particularly reflected and examined and revealed two depressed puncture type wounds into the bone of the culvarium skull itself. And there was not attended by significant hemorrhage in this area.

Q And in that particular wound appear to be—

MR. BOLDING: Your Honor—I'm sorry go ahead.

Q Appear to be inconsistent with the crush injury which you previously described?

A Yes, this external examination of the laceration showed a different direction of angle, a depressive force rather than a bursting force [166] and subsequent examination of the skull itself showed a depressed puncture type wound rather than the fragmentation that was depressive in other parts.

Q Did you formally conclude, Doctor, as to how that particular or those particular injuries might have been caused or—

A That was—suggested at least two different kinds of force. One in which there was external application of a pointed object to the skull rather than flat, and more expanded impression that one would expect with the tire.

Q Is that type of injury, could that have been caused by a rock—

MR. BOLDING: Object, Your Honor, of course that if obviously leading. That is the answer he wants to that type of a question. What it could have been.

THE COURT: Objection overruled. You may answer it.

A Yes.

Q Doctor, taking into consideration the crush injury and the manifestation of the crush injury to the skull,

could there have been other trauma applied to the skull which was masked by these other massive injuries?

[167] MR. BOLDING: I object to that. The test is not—It could have been the test is reasonable medical probability and anything possible when you object to it for that reason.

THE COURT: Objection overruled. You may answer it.

A You are asking that other forces, other injuries could have been applied to the skull which were masked?

Q By the crushing injury.

A Yes, that is possible.

Q You remember the possible height and weight, Doctor, or could you refresh your memory from your report concerning that?

A The height was recorded at approximately 5′5″, the weight 143 pounds.

* * * *

[168] CROSS EXAMINATION BY MR. BOLDING:

* * * *

[169] Q Let's see, Doctor, you talked about two different kinds of force, and a pointed object in response to the prosecutor's questions. You said that this could possibly—there could possibly been an injury from a rock?

A That's right.

Q It could have been from a—let's say I'm not a mechanic. Could it have been from some part of an automobile, couldn't it?

A That is possible.

Q Could it have been from a, I think they [170] call those things something that goes to the wheel there, a radial or something that is connected with the wheel on an automobile, couldn't it?

A I don't know specifically the type to which you refer.

Q Some kind of a pointed object?

A Alright.

Q It is possible?

A It is possible.

Q A rock would tend to make more of an indentation than a pointed depression, would it not? A rock say 8 inches in diameter?

A It would depend on the configuration of the rock.

Q Okay. So you're not saying anything in regard to other injuries which you may have discovered on the body of Bernard Crummett You don't have any idea where those injuries came from?

A Except for those of the shrapnel.

Q I'm talking about shrapnel didn't cause the death, did it?

A No.

Q And it didn't have anything to do with it?

[171] A No.

Q So, any other injury that you saw that wasn't compatible with being run over by an automobile or by a tire of an automobile? You don't have any idea how those got there, do you? Except they were caused by something outside?

A I can't say I don't have any idea, because examining the scene of the body I did notice—

Q You don't have Doctor—you don't have any professional opinion as to the type of force that was applied except there is some kind of a trauma with some type of an instrument being applied against the body or the body being applied against it? Isn't that the medical reasoning?

A Yes.

Q Thank you, Doctor. This body could have been thrown against something and those injuries caused by that, isn't that true?

A That is possible.

Q So what I'm saying, when you have an injury like you have described, you cannot with accuracy predict the exact instrument causing that injury or that trauma, can you? You can tell?

[172] A Yes, we can list probabilities.

Q Alright. Good. And in this area you would have to list a pointed object that could make a depression the size that you found, isn't that correct?

A Not any. I would remove, for instance, sharp instruments such as knives.

Q Right. We're not talking about a small puncture wound, are we?

A No.

* * * *

[174] Q And you have testified here to the cause of death?

A Yes.

Q That is just the way listed in your autopsy report as a crush injury to the brain. A crush injury to the brain?

A That's right.

Q Due to a comminuted skull fracture?

A Yes.

Q Due to a land craft vehicle?

A Right.

Q What is comminuted mean?

A Fragmented.

Q And what do you mean by cause of death as Bernard Crummett was run over? And his head was crushed by the tire of an automobile, is that correct?

A That's right.

Q And you know, do you not, that pictures that you have looked at here today and [175] have been introduced here today are shocking to the normal, average person?

A I would like to consider myself normal.

Q You are normal?

A I'm not shocked.

Q It is not—you're not shocked. Is that correct?

A No.

Q You have seen a thousand or two thousand of these pictures?

A Let's be more conservative, a thousand.

Q Your doctor's terminology, Doctor Halka, you used the word layman, do you not?

A I suppose so.

Q What does that mean to you? A layman?

A One who has not had medical training, restricted to medicine. I have a layman in regard to the legal profession.

Q But insofar as the medical profession, you mean someone not in the medical profession?

A That's right.

Q These pictures, Doctor, that you have shown us here, you would anticipate they would be shocking to the average layman, wouldn't you?

A It is possible.

* * * *

[183] Q Okay. Now, let's talk about these injuries that you say took place at the time Bernard Crummett was dead. Can you tell me again which injuries took place at the time he was already dead?

A Here is the best scene here relating to the trunk and the upper extremities.

Q Alright.

A The arm.

[184] Q The upper right arm and the right side of the body, is that correct?

A That's right. Close up of the same.

Q They all show the same thing?

A The same side, yes.

Q So those injuries you say, those wounds because of what were caused after death?

A It was an absence of blood at the latterated edge and depth of the wounds. This is confirmed by examination as well.

Q What did you say, lack of hemorrhaging?

A That's right.

Q That means not bleeding?

A That's right.

Q When does a person—how soon after a person is dead does a cut, say, stop bleeding and not bleed?

A It depends upon the retraction of the vessels, at what depth those vessels are located.

Q Well, how about a depth right below the epidermis? Right below the skin?

A They would stop rather quickly because they are small capillaries and they rear greater pressure.

Q What are you talking about, five minutes, ten minutes?

[185] A We are talking in time after death, immediately.

Q Immediately after death?

A Yes. Coincident with death.

Q Yes. Coincident with death. So, if someone were to die and one millisecond after he died, he were to be cut, there would be no blood there. Is that correct?

A I would find it difficult to define a millisecond. That is not my common experience.

Q Well, put it in your terminology then.

A Within seconds.

Q Within seconds?

A Yes.

* * * *

[192] Q Let's see, Doctor Halka, you go back over this one more time and and maybe we can go a little slower and see what really the picture now on Bernard Crummett is. Those injuries that he received when the ribs were broken caused some internal injury?

A By fracture. That fact of fracture is the injury I am speaking of.

Q Did they cause internal injuries other than the fractures? In other words, injuries to any other internal organ?

A No.

Q When a person has a fracture of the rib, does he bleed from that?

A Yes.

Q Okay. Internal bleeding?

A That is internal into the muscles or into the cavity depending if it is an open fracture or not.

Q And the average person, or well let's say, in Bernard here, how deep from his skin, [193] how far in do you have to go before you get to the ribs?

A A matter of half inch, perhaps, or an inch.

Q How about centimeters? Is that—

A One to two centimeters.

Q Two centimeters is an inch?

A Two and a half is an inch.

Q Okay. Okay, now, let's go back over it again. What were you talking about, the venous something?

A The venous circulation.

Q Venous circulation, what is that?

A That is the return flow of blood from the porphyry to the center from the exterior to the core.

Q In a person's body that means from the exterior parts of the body to the heart?

A Yes.

Q That is venous circulation?

A Yes.

Q What is the other?

A Arterial.

Q That means going out?

A From the heart to the extremities.

Q Venous is coming back?

[194] A Right.

Q Now, when a person sustains an injury, let's say a wound, an open wound that is bleeding, does the blood flow out of that wound normally?

A Yes.

Q And where there is a massive injury, a big injury as Bernard sustained by being run over by a tire, is there a lot of blood that comes out there?

A Yes.

Q Okay, now. Where does that blood come from?

A That blood comes from the major vessels which supply the brain, the scalp, and the skull.

Q Does it—alright, once a person dies and as you stated Bernard died from being run over with the car, what happens to a person's blood, say a person's blood in his legs. What happens to that blood?

A If the wound is sustained in the leg?

Q No. Let's say in his skull? What happens? The blood in the leg goes to the skull?

A No.

Q Okay. We're talking about—

[195] A So, that blood in his leg would be the external or the exterior. It would return in the process of dying to the core, to the heart core.

Q And go from the heart where?

A To wherever the hole is. In this case we're talking about several vessels in the skull.

Q And the heart keeps pumping?

A Yes.

Q After death?

A No.

Q No?

A No.

Q We—

A For practical purposes we define death at the time the heart stops pumping with circulation and the reason for this is the return of blood is an attempt to compensate the loss of blood which is no longer contained in the system, in the arterial or venous system. And as long as this compensation cannot provide sufficient blood for the heart to pump, the heart will pump.

Q Okay, now. In Bernard you figured that this heart pumping kept up for twenty-five or [196] thirty seconds?

A That is fair.

Q Twenty-five to thirty seconds? Now then, if only after the heart stops pumping that a person may be cut, and that no blood or oozing occurs—

A Right.

Q Is that fair?

A That's right.

Q So these wounds that Bernard had received to his side of his abdomen and to his arm and to his ribs, I guess.

A Right.

Q All of those, you're saying, occurred after the time the heart stopped beating?

A Right.

Q Okay. I think I'm still with you so far. Now, then, is there—so in Bernard these wounds could have happened anytime between thirty seconds after he died and what? What is the outer limit?

A These wounds could have occurred within thirty seconds outer limits. There is none—there would be some evidence you talking about the minimum, the outer limits is not applicable as I see it.

[197] Q That is where you lost me. You examined Bernard at about 7:00 in the morning?

A Right.

Q So you know that these wounds happened some time before seven in the morning?

A Right.

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[205] REDIRECT EXAMINATION BY MR. HOWARD:

• • • •

[207] Q Just a few questions, Doctor, the thirty second period of time pertaining—talking about that is on the exhibit or on the board that Mr. Bolding put on. Is that the period of time it takes for the heart, or it would have taken in Bernie's case, the approximate period of time for the heart to pump the blood out of the injury?

A That would be a minimum.

Q A minimum, that is what I mean.

A That is based on the fact that venous circulation in an adult male for his build would be approximately twenty seconds, if the heart were faster than fifteen if slower than twenty-five. So, we are giving a slight edge there

and agreeing to about thirty seconds. It's been determined in their normal and standard for that figure.

Q That would be, then, approximate minimum period of time it would take for the heart to pump the blood out on the pavement, so to speak, from the injuries?

A Yes.

Q We're talking about—

A Right.

Q And then, after that period of time [208] the injury would appear if it were sustained after thirty seconds, would appear as much as they do in the photographs?

A That's right.

Q So, you mean Doctor, that there is an approximate minimum of thirty seconds between the—or in your opinion, between the time the head injuries were sustained and the time that the injuries to the lower body, which show very little bleeding was sustained?

A That's right.

Q That is not the period of time between the time the heart stopped, if we defined Bernie died in terms of the time his heart stopped and injuries were sustained?

A As a minimum, you are depending on the action of the heart to keep the circulation sufficient so that there would be some oozing from small or large vessels.

Q We are talking about the seconds between the time the head injuries were sustained and the other injuries?

A Yes.

Q I'm not sure that we showed the jury when we started talking about this what we're talking about. The evidence is there was little [209] bleeding or oozing from those wounds whichever photograph best illustrates that. Could you show the jury what you see there which indicates to you that there was little bleeding. And therefore, the injuries were sustained at least thirty seconds apart.

A These two photographs show both the injury to the trunk that I spoke of, and those to the head. And this

photograph, also, you will notice, that there was a white plastic bag surrounding the head and it shows blood stains. There was blood in the hair, on the skin, and in the close-up you can see that these wounds show blood contained within the skin. And there are all about the head and neck area extending in a linear kind of direction up into the—well, we'll see only here the right side.

Q And it is the color of these wounds, at least in part, that distinguishes then one from the other. Is that correct?

A That's right. And the fact that there is still fluid blood in here.

Q Doctor, then assuming that the same automobile caused all these injuries—would it not be true that that—

MR. BOLDING: I object to that. There [210] isn't any proof of that unless he is going to prove—

THE COURT: Objection overruled. He is assuming, he is asking him to assume that.

MR. BOLDING: I thought, only hypothetical that he must be prepared to prove that.

THE COURT: The objection is overruled.

Q Assuming that the same automobile or even the same tire caused all of these injuries, then it would have to have been over a thirty second period of time. That the injuries were being sustained?

A That's right.

Q A minimum?

A At the minimum.

Q Does that fact, Doctor, play a part in your conclusion that Bernie was probably run over more than one time?

A Yes.

MR. HOWARD: No further questions, Your Honor.

RECROSS EXAMINATION BY MR. BOLDING:

Q Doctor, I'm sorry. I'm going to have to go over one more time. I think I misunderstood [211] Mr. Howard. The wound to the head caused the death?

A That's right.

Q The wound to the neck was sustained probably at the same time, wasn't it?

A That's right.

Q Alright. So all of those were sustained at one time, I mean probably?

A Yes.

Q Now then, those wounds happened at one time?

A Yes.

Q The wound to the arm, the abdomen, and the rib occurred after that time?

A Right.

Q At least thirty seconds after that time?

A That's right.

Q So they did not happen, in all probability, they did not happen within thirty seconds of each other?

A That's right.

Q Okay. And they happened anywhere, I'm talking about the wound to the abdomen and the arm and the ribs, they happened anywhere from thirty seconds after the injury to the head? [212] Anywhere from thirty seconds after the injury to the head up to the time that you examined the body, sometime in there?

A Alright.

Q Is that right?

A That's right.

Q They did not happen between the time of the injury and the time thirty seconds later?

A That's right.

* * * *

[EXCERPT OF TRIAL TESTIMONY OF FAITH ERWIN, TRANSCRIPT DATED JANUARY 15, 1974, VOL. II]

[TRANSCRIPT PAGES 429-512]

* * * *

FAITH ERWIN

A witness called by the State, being first duly sworn testified as follows:

* * * *

Q That what occurred?

A Then after they came out of the bedroom, Becky and that man were still on the couch. I was standing up with Willy, and Willy whispered we were going to rob him, but don't say anything. He left.

Q Then what happened?

A We left.

Q In what car did you leave?

A The white station wagon.

Q And who left?

A Becky and me and Willy and that man.

Q Where did you go?

A Over by "A" Mountain.

Q Had you been over in that area before?

A Not that I recall, I can't remember.

Q Had you been in the "A" Mountain area before?

A Yes.

Q With whom?

A By myself, you know, before this occurred.

Q About what time was it when you went to that area?

A About—it was after twelve, late.

Q Any discussion in the car on the way out there to that area?

A No.

Q You don't remember what was said?

A Nothing. We—really or anything, I can't recall what was said.

Q Can you describe the area where you went to where the car finally stopped?

A It was all desert.

Q Who drove the car to that location?

A Willy.

Q Did the car finally stop then, in a particular place that you can describe by the desert?

A Yes. Willy stopped the car and Willy said we had a flat. And the man got out, and I got out, and—

Q You say, "the man", do you mean the fellow who looked like the picture that I showed you?

A Yes. When the man got out, Willy got out and hit him over the head. You know, hit him with his fist and knocked him out.

Q Where were you seated when this happened?

A The passenger side in the front seat.

Q Where did this occur? What relation—which side of the car?

A The driver's side.

Q Did you actually see Willy Richmond hit this man?

A Yes.

Q Then what happened?

A Then I got out because I couldn't get out from the driver's side. That man was right there by the second door. I got out on the other side.

Q You got out on the passenger side of the vehicle?

A Yes. And I was standing around, and I went back around. That is when he was hit with the rock and was hitting that man.

Q Where was he getting the rocks from?

A The man—here is the car. It was right here. And the man was on the second door and Willy had to walk around like this to the desert side to get the rocks.

Q The man and Willy were both on the driver's side of the vehicle?

A Yes.

• • • •

Q And you got out on the other side of the door?

A Yes.

Q Now, where did you see Willy go to get these rocks?

A Around the car. He had to go around to that desert part.

Q To the same side of the car that you were on?

A Yes.

Q Further than where you were?

A I was just right there by the car, and about the same.

Q Okay. You actually saw him pick up the rocks?

A Yes.

Q Then what did he do?

A He came back around and, honest, the man—then I got sick. And I went around—

Q I asked you, can you describe what he did?

A He was throwing them like that.

Q Where was he standing?

A Right by the man.

Q Right beside the man?

A The man was laying there and he was right there.

Q And he was throwing them?

A Yes.

Q How large were these rocks?

A About like this.

MR. BOLDING: We would ask that the record indicate some size of the rocks, Your Honor.

Q About how large were the rocks?

A About like this. Just pretty big.

Q Approximately six or eight inches across. Is that what you are indicating?

A Maybe—they were big. I don't—they weren't small, they were pretty large.

Q Then what occurred?

A And then, you know, he hit him. And I was getting sick. And the next thing I know Becky was saying, "This is no time for getting sick."

Q Why were you getting sick?

A Because I was high enough to come down off of heroin.

Q Then what happened?

A Well, they all got in the car, and Becky was getting the wallet and what else, you know. I looked over to see what else was taken. And Becky was getting the wallet and we came in the car and left.

Q And where did you go from there?

A Back to the Sands Motel.

Q Did you run over anything?

A Yes, a man. It was a bump, after we were leaving.

Q After you felt that bump, was anything said in the car when you felt that bump?

A Becky said, it felt like a man's body.

Q Who was driving the car?

A Willy.

Q After you felt that bump, did you just keep going the same direction?

A Yes. I was laying back. I didn't feel him turn around or—

Q You don't remember whether the car turned around or anything?

A No.

Q Did you see Becky picking up any rocks?

A No.

Q Did you see Becky hitting the man?

A No.

Q At any time during this period of time, did Becky drive the car?

A No.

* * * *

Q How much heroin had you shot that day?

A I don't remember.

Q Were you high from heroin?

A Yes.

Q Okay. So the first person that you talked to then after you went to juvenile down here in Tucson, the first person that you talked to about whatever happened on the night of August 26 was who?

A You mean after I got picked up?

Q Yes.

A My lawyer.

Q Was that this man over here?

A Yes.

* * * *

Q Alright. So it was your understanding that, Faith, and correct me if I'm wrong, that you would not be charged with any crime?

A Yes.

Q And that you would not be sent back to Phoenix?

A Yes.

Q And that you would be placed in a foster home?

A Yes.

Q You would not be locked up?

A Yes.

Q If you would testify in this case?

A Yes. But Arizona—I don't know. Arizona told my lawyer something about that. I couldn't be just that free.

Q But you would be in a foster home?

A Pretty soon.

Q You wouldn't be locked up with a fence around it, right?

A I would be locked up. It wouldn't be for long.

Q I mean pretty soon you would get over to a foster home and wouldn't be locked up, is that right?

A Yes.

Q That was your understanding if you testified here today? All of that would happen?

A Yes.

Q So you agreed?

A Yes.

Q Have you signed an agreement with this prosecutor and with this man over here, that if you would testify here that you would get finally set into a foster home and not be locked and not be charged with any crime?

A Yes.

* * * *

Q You had Cotton Fever and still had the high temperature?

A Yes.

Q That is when you laid back and put your head back on the back and shut your eyes?

A Yes.

Q Alright. So there's no way, then, is there, Faith, for you to really know who got in the driver's seat?

A I saw Willy get in the driver's seat before I leaned back. Becky got in the back what is—that is when she talked about how much money they got.

Q Isn't it true Willy scooted over by you, and you were in the passenger side; and Becky got in and they took off, and Becky couldn't drive the car very well, and Willy stopped her after about a block and said, "Let me drive this thing." And he got over and drove?

A That is not true.

Q You were lying there with your—

A Becky was in the back.

Q Becky was in the back? You're positive of that?

A I am positive of it.

Q You were positive that Becky was in back?

A I am positive. I know Willy was driving.

Q Where was Becky?

A I am not sure. She was in the back or the front. But I knew Willy was driving the car because I leaned over that way.

Q At least he was driving when you got to the motel, wasn't he?

A Yes.

* * * *

Q Then, let's talk about where this, whose automobile this was?

A The white station wagon?

Q Yes, let's talk about this.

A Well, now, I know it was Ernest's from the last trial.

Q Okay. From the time when we were over in the Justice of the Peace Court, you know it was Ernest's?

A I didn't know then. I thought it was Becky's.

Q What made you think it was Becky's?

A She was the one that had it.

Q As long as you knew Becky she had that car, didn't she?

A Yes.

Q Okay. And she drove that car, didn't she?

A I can't remember if it was her or Sheila driving it. It went out the next night.

Q I am talking about any time?

A I don't recall.

Q Sorry.

A I can't remember if she was driving or not, because she can't drive very well.

Q But she can drive it can't she?

A She told me she couldn't drive.

Q You have been in the car with her when she was driving, haven't you?

A Not that I recall. I can't remember.

Q Not that you recall. Okay.

Now, had you ever told anybody that Becky had driven this car?

A I said the last time I was in Court—

Q Oh, you did?

A Yes.

Q How many times did you say it the last time you were in court?

A Once.

Q Just once?

A That I remember. I was going—I just remember once.

Q You didn't say it was more than once. You didn't say that more than once, did you?

A I don't recall.

Q Alright. And so that if Becky had driven the car back on that date, and now you say you don't remember

whether she drove the car. Which time do you think would be correct?

A What do you mean?

Q Well, you remember saying back on September 17, you remember saying that Becky drove the car?

A Yes.

Q Okay. And now you are saying you don't remember whether she drove it?

A I can't remember if it was hers.

THE COURT: I'm afraid that your questions might be confusing, when you say that she remembered that Becky drove the car.

MR. BOLDING: Okay. I'll try to clear that up, Your Honor.

Q Back on September 17 you answered questions and you said that you had been in that car, that white car with Becky. With just Becky and you, and with Becky driving, didn't you?

A Yes.

Q Yes?

A I said that at the last court.

Q That was in response to a question from the prosecutor, wasn't it?

A I don't remember who it was from.

Q And now you are saying to us that you don't remember whether Becky drove it?

A I can't remember if it was her or Sheila. Seems like I remember that Becky said she can't drive.

Q Let's see, have you talked with the prosecutor between September 17 and now?

A Yes.

Q Did you talk to him about whether Becky could drive or not?

A I don't remember.

Q You talked in his office yesterday with him, didn't you?

A Yes.

Q About whether—

A We just went over the transcript on it. I told him that I was remembering that Becky couldn't drive.

Q He talked with you about Becky could drive, or—

A I just told him that—

Q That just happened to come up?

A When I was reading over the transcript.

Q So what you are trying to tell us is the truth? That is the truth is that you don't think that Becky could drive?

A Right.

Q Okay. Now then, I will ask you if you remember these questions and these answers that were given back on September 17, page 25 line 15. And the question by Mr. Howard—

MR. HOWARD: I object, Your Honor. I don't believe this is inconsistent with what she said on the stand. It is a warning. A question was asked and she said, "yes." She said that on prior occasion, and that precludes the defense from reading it again.

THE COURT: I will allow him to read it again.

Q (by Mr. Bolding) Alright, do you remember this question and this answer? Question—by Mr. Howard, line 12, "Who did that car actually belong to, do you know?" Answer—"No." Question (By Mr. Howard) "Is this a car you had seen Becky driving before?" Answer—"Yes." Question—"On many occasions?" Answer—"No." You remember giving those questions and answers?

A Yes.

Q And then on page 42, line 12—

MR. HOWARD: I object, Your Honor.

THE COURT: Overruled.

Q The question by me. See if you remember these questions and these answers. Question—"Alright, as a matter of fact, you had been in that car with Becky by herself, just Becky and you, haven't you?" Answer—"Yes." Question—"With Becky driving?" Answer—"Yes." You remember those answers?

A Yes.

• • • •

Q You never told Regina Becky was driving the car the night this thing happened?

A No.

Q Okay. You just heard that night that Bernard Crummett was run over, you just heard one bump, didn't you?

MR. BOLDING: I don't have any other questions at this time.

• • • •

Q And, as a matter of fact, you knew back at the time of the preliminary hearing and right now you knew that if you got up there and testified, in other words, before you ever got up there you knew that once you got up there and testified that you would be given immunity against all charges?

A Yes.

Q And you knew that if you did not get up there and testify that you probably would be charged with robbery and murder, right?

A Yes.

Q Okay. You say you lied before, right?

A Yes.

Q You lied to get out of trouble before, haven't you?

A Not—yes.

Q You have gotten out of some trouble by lying before?

A Yes.

Q But you're telling us the truth now?

A Yes.

MR. BOLDING: Your Honor, we would offer this stipulation and agreement "G" in evidence at this time.

MR. HOWARD: No objection.

THE COURT: "G" may be admitted.

MR. BOLDING: I would like to have the opportunity to read to the jury, if I may?

THE COURT: You might.

MR. BOLDING: "Stipulation and agreement.

The State of Arizona, by and through, Dennis De Concini, Pima County Attorney and James M. Howard, his deputy, and Faith Erwin, represented by Richard J.

Michella entered into the following stipulation and agreement.

Number One—That Faith Erwin does hereby promise and agree to relate the true facts surrounding the death of Bernard Crummett on or about the 26th of August 1973 to law enforcement officers, and to testify to these facts at the preliminary hearing in this matter now scheduled for the 17th of September 1973. And in all judicial proceedings following that hearing in which her testimony is requested.

Number 2—That in regard—in return for her oral statement and testimony as aforesaid the State of Arizona promises and agrees that Faith Erwin will not be prosecuted for any crime save homicide committed by her prior to today's date. That she will not be prosecuted for her acts in connection with the death of Bernard Crummett. That she will remain in the custody of the State Department of Corrections at a prearranged place until this action against Willy Lee Richmond is terminated and that any and all matters now pending in juvenile court will be dismissed with prejudice.

Dated the 13th day of September 1973. Signed by James M. Howard, Deputy County Attorney.

Faith Erwin.

Richard J. Michella, Attorney for Faith Erwin."

So right now you have gotten out of trouble you were in?

A Yes.

• • • •

[EXCERPT OF TAPED CONFESSION OF DEFENDANT RICHMOND INTRODUCED AT TRIAL, TRANSCRIPT DATED JANUARY 15, 1974, VOL. II]

[TRANSCRIPT PAGES 538-545]

* * * *

Q The following being the taped statement taken at the Pima County Holding area, in the County Administration Building on 9-11-73 at approximately 10-27 hours. Present during this taping is Willy Lee Richmond, Sargant Larry Bunting, Tucson Police Department and Detective Mike Tucker, Pima County Sheriff Office.

This tape is being taken in reference to the death of Bernard T. Crummett, which occurred on the 26th day of August of 1973.

A COPY OF THE TAPE.

"Q Would you please state your full name.

A Willy Lee Richmond.

Q Please state your date of birth and where you were born?

A March 2, 1948, Lambert, Mississippi.

Q Mr. Richmond, being that you are in custody, I have to advise you of your Miranda Rights. You have the right to remain silent. Anything you say can and will be used against you in a Court of law. You have the right to the presence of an attorney to assist you prior to questioning, and to be with you if you so desire. If you cannot afford an attorney, you have the right to have an attorney appointed for you prior to questioning. Do you understand these rights?

A Yes, I do.

Q Now, having been advised of these rights, and understanding these rights will you answer my questions?

A Yes.

Q Would you please relate to me in your own words, what occurred on about the 25th or 26th of August 1973 in reference to a death on west 22nd Street behind "A" Mountain?

A Okay, me and Faith, my old lady, was at the Bird Cage and we was sitting outside in the car. You know, we smoked pot too. You know. So we were sitting in the car, and we were sitting in Becky's car because me and Faith stayed over at Becky's apartment, you know, over night. And it was a couple of days, I think it was a couple of days because I was driving the car, the station wagon. You know, I took it.

She came out with this dude, a trick, okay. We goes to the apartment with her, to her apartment at the Desert Sands and we have a big argument. You know, about her, and she tried to get my woman to turn a trick. And I don't want her to turn no trick. And dude want to pay my woman, my girl friend $40, you know, for a trick. And I told him no way. So we get to arguing in the car, you know. So she gets pissed off, you know. So I told her fuck it, just take me and Faith and drop us off and she said no. I take it back, you know, I apologize and she took me out the car and went bla bla this and that. You know. So she, the trick got money, you know. So okay. Where are you going to? Well, we are going to take him to the apartment.

So we went to the apartment. Okay. When you get to a short change, you know, like a prostitute or get like—you give the chick $20 and she could come to her man and give her man $20 and he goes to his pocket and he has two tens, you know, in his pocket. And he comes up with it. You dig? Alright. Well, this was going to cost some dough, which I had the dough.

This was in front, him finding the dough. I didn't know what he was. Okay. So I does it on her to game. So I say, wait a minute Mama this ain't nothing but a tin. I'm palmy with twenty, and I've got the other ten in my hand, and said, Oh, this is all I got, you know. You didn't give me but a ten.

So she goes back to the dude and makes the dude give her twenty more dollars. And at that time he shows her

his wallet. You know. And she comes back. The bitch must have been stupid or something. I don't know, man. But anyway, she said he's loaded. He's got bread.

So I said we can't rip him off here in the apartment, because he will remember the apartment. You know. So she said—

THE COURT: There is a certain portion in here that I have ruled is not admissible, and we are trying to skip that particular portion.

(Whereupon at this time the portion was omitted and not heard by the jury.)—like you say out there at 22nd. Drove up there, turned around and I stopped the car. He was on the side, I was in the back, and Faith and her were in the front seat with me. So I get out and she gets out.

I opened the door. I snatched the dude out by his colloar, and bam, he falls straight out. I wanted to go through his pockets, but she was already going through his pockets and he was getting up and I reached down and punched him again. So my old lady, Faith, she couldn't take it. She got out of the car and she looked and she started crying, you know. And about that time I am looking at her, and going through his change. And this rock, you know, like that, and dip, dip like that, you know. And I said, wow, to myself, you know. Come on let's get in the car and me and her get in the car, and I am talking to her and Rebecca gets in the car and she backed up and she throws up in gear and comes back over. And we were going on down further and she was all over the fucking road, and said give me this mother fucking car and let me drive, you know.

And so I went on and we went back to see what we did do. We went back to her apartment, and split the money. And she didn't want to give my old lady no money. So I did. So she said well, you give it to her. And so, you know, so I gave my old lady some bread because she was feeling down and we were copped and we fixed up again.

Q Whose car was used in this?

A Ernest Jones.

Q Could you describe the car to me?

A It's a white '59 Chevy or '69 or something. It's white, got a dent on the—a dent on the left side.

* * * *

Q Did you know who this guy was? What his name was?

A I didn't even know nothing about him. He was just a trick she pulled.

Q Did she, Becky, you refer to this person Becky, do you know her full name?

A Becky, Rebecca, Rebecca Corrella.

Q Rebecca Corrella? Did she ask you and Faith to go with her from the Bird Cage, is that right?

A She wanted my woman to turn a trick and I told her no. And she got mad. She tell me all you want me to turn tricks is and shit and you let this white bitch lay up and not do nothing.

And I tell her, well, she is just not that type of a person, you know.

Q Were you carrying a gun that night?

A She had it. She had it in her purse.

Q What kind of a gun was it?

A A 22.

* * * *

[EXCERPT OF TESTIMONY OF CHARLES PALMER, TRANSCRIPT DATED JANUARY 15, 1974, VOL. II]

[TRANSCRIPT PAGES 561-566]

* * * *

CHARLES PALMER,

a witness called by the defendant, being first duly sworn testified as follows:

DIRECT EXAMINATION BY MR. BOLDING:

Q Will you state your name, please, sir?

A Charles Palmer.

Q Let me just introduce myself. I am Ed Bolding, and I called you on the telephone, do you remember receiving the phone call?

A Yes.

Q Alright, Mr. Palmer. What is your occupation, sir?

A Right now, I am a service station attendant.

Q Back in August and September of 1973 what was your occupation, sir?

A Security guard for Texton.

Q What is Texton?

A A building contractor for Park Place and various other areas around town.

Q Alright. Where—let's talk specifically about August 25 and August 26 of 1973. Where were you working specifically?

A Park Place. Which is off 22nd on the west side of town.

Q And Okay. Was it Park Place?

A It is a housing development about 300 and 80 homes being built.

Q And your job was to be security man?

A Security guard, yes.

Q At night?

A Yes.

* * * *

Q Now, on the morning of August 26, 1973, Mr. Palmer, did you see any automobiles driving down here to the west end of 22nd?

A Well, as far as going clear to the end of west end of 22nd Street, I couldn't say that they went over the berm or anything like that. But they went past my area and there was no place for them to turn off rather than go to the end.

Q Alright, sir. Your Park Place area where you were guarding that night, there is a turnoff of 22nd, is that correct?

A Yes.

Q That is the last turnoff before an automobile would get to the dead end of 22nd?

A Of any residence or anything like that.

Q Okay. Alright. On the morning of August 26, 1973 did you see an automobile driving down toward the dead end or the very end of west 22nd?

A Yes.

Q Do you have field glasses that you use?

A Yes.

Q Or you had been at that time?

A I had been at that time.

Q And how many automobiles, let's say on the morning between midnight of the morning of August 26 and 6:30 the time you went off—or well—alright let's go back and reconstruct a little more. At about 5:20 that morning did you see any Sheriff's vehicles or any activity?

A Yes.

Q Now, between midnight and 5:20 when you say that you saw Sheriff's Vehicles, how many cars did you see go down toward the west end or the dead end of west 22nd?

A Well, between six and eight, I don't exactly know how many, but it was between six and eight.

Q Alright. The last car that you saw and you may need to refresh your memory from this statement, do you remember about what time the last car was that went down there before the Sheriff's vehicle arrived?

A I would say it was about four.

Q You saw that vehicle go toward the end of the paved portion?

A Yes.

Q And stayed there about how long?

A I don't think it stayed there very long. It just turned around and it came right back out.

* * * *

[EXCERPT OF TRIAL TRANSCRIPT OF COURT'S INSTRUCTIONS TO THE JURY]

[TRANSCRIPT PAGES 659-660]

* * * *

The unlawful killing of a human being whether intentional, unintentional, or accidental which occurs as a result of the perpetration of or attempt to perpetrate the crime of robbery and where there was in the mind of the perpetrator a specific intent to commit such crime is murder of the first degree.

The specific intent to perpetrate robbery and the perpetration or attempt to perpetrate such crime must be proved beyond a reasonable doubt.

If a human being is killed by anyone of several persons engaged in the perpetration of or attempt to perpetrate the crime of robbery, all persons who either directly or actively commit the act constituting such crime or who knowingly and with a criminal intent aid and abet in its commission, or whether present or not who advise or encourage its commission are guilty of murder in the first degree, whether the killing is intentional, unintentional, or accidental.

* * * *

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

(Caption Omitted in Printing)

VERDICT

We, the Jury, duly impaneled and sworn in the above entitled action, upon our oaths, do find the Defendant, WILLIE LEE RICHMOND, GUILTY of the crime of FIRST DEGREE MURDER under Count I of the Information.

/s/ Walter E. Cally
Foreman

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

(Caption Omitted in Printing)

MINUTE ENTRY

Date Feb. 27, 1974

SENTENCING:

Defendent present. James Dickerson reporting.

This being the time set for sentencing, and no legal cause having been shown why sentence should not be passed at this time; and

The Defendant having been found GUILTY by a Jury of Count II of the Information which charges ROBBERY;

IT IS THE JUDGMENT OF THE COURT that the Defendant is GUILTY as charged.

IT IS THE JUDGMENT AND SENTENCE OF THE COURT that the Defendant be incarcerated in the Arizona State Prison for a period of not less than fifteen (15) nor more than twenty (20) years.

As to Count I,—Pursuant to Section 13-454, Subsection (c), the Court returns the following special Verdict as to findings of existence or nonexistence of circumstances set forth in Subsections (e) and (f):

As to Subsection (e): Aggravating Circumstances to be Considered:

As to Item 1:—THE COURT FINDS nonexistence of that item.

As to Item 2:—THE COURT FINDS the Defendant was previously convicted of a felony in the United States

involving use or threat of violence on another in A-17969 in the Superior Court of Pima County.

As to Items 3, 4 and 5:—THE COURT FINDS nonexistence of those items.

As to Item 6:—THE COURT FINDS that the Defendant did commit the offense in an especially heinous and cruel manner.

As to Subsection (f): Mitigating Circumstances

As to Item 1:—THE COURT FINDS that the Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was not significantly impaired.

As to Item 2:—THE COURT FINDS that the Defendant was not under unusual or substantial duress.

As to Items 3 and 4:—THE COURT FINDS nonexistence of those items.

Therefore, the Jury having returned a Verdict of GUILTY to the crime of FIRST DEGREE MURDER:

IT IS THE JUDGMENT OF THE COURT that the Defendant is GUILTY as charged.

IT IS THE FURTHER JUDGMENT OF THE COURT that the Defendant be sentenced to DEATH.

IT IS ORDERED that the Clerk shall file a notice of appeal as provided by the Rules of Criminal Procedure, 26.15.

IT IS ORDERED that the Defendant remain in the custody of the Sheriff for transportation to the Arizona State Prison.

Deft. is advised of his appeal rights.

IT IS ORDERED that the Public Defender be appointed to represent the Defendant on appeal to the Arizona Supreme Court.

/s/ Richard N. Roylston
Judge

MARY DEGAGNE
Deputy Clerk

cc: County Attorney
Sheriff
Public Defender, Ed Bolding
Court Administrator
Arizona State Prison
Adult Program

SUPREME COURT OF ARIZONA
IN BANC

No. 2914

STATE OF ARIZONA,
Appellee,

v.

WILLIE LEE RICHMOND,
Appellant.

Dec. 20, 1976

HOLOHAN, Justice.

Willie Lee Richmond was tried and convicted of the first-degree murder of Bernard Crummett in Pima County, Arizona. A sentencing hearing was held, and the defendant was sentenced to death.

Evidence introduced at trial showed that on the evening of August 25, 1973, the victim went into the Birdcage bar in Tucson and met Becky Corella, a dancer working there. Later that evening, Becky and Crummett went out to the parking lot to persuade the defendant to allow his 15-year-old girlfriend, Faith Erwin, to prostitute herself with Crummett. When both the defendant and Faith refused, a conversation ensued and eventually Becky decided to prostitute herself with Crummett. All four persons drove in Becky's borrowed station wagon to her motel apartment on the Benson highway.

When Becky and Crummett returned from the bedroom, the defendant whispered to Faith that the three of them were going to rob the victim, but not in the apartment because Crummett would remember the location.

In the company of his two accomplices, the defendant drove the victim to a remote area outside Tucson and stopped the vehicle, saying the station wagon had a flat tire. When the victim got out of the car, the defendant beat him with his fists and rocks rendering the victim unconscious. Thereafter Becky and the defendant went through the victim's pockets taking his watch and wallet. In leaving the scene the vehicle was twice driven over Crummett who was still lying unconscious on the ground. The victim died from his injuries.

Although granted immunity, Becky Corella was not called upon to testify by either side. At trial, the crucial evidence against the defendant was the testimony of Faith Erwin and the defendant's own extrajudicial admissions. The defendant did not testify. The state's theory was that he perpetrated the homicide while engaged in robbery and thus committed first-degree murder. The primary defense theory was that because the robbery had terminated prior to the homicide the defendant could not be found guilty of first-degree murder under a felony-murder theory.

After the defendant was convicted, a sentencing hearing was held pursuant to A.R.S. § 13-454 to determine the sentence. The court rendered a special verdict finding the existence of two aggravating circumstances: 1) that the defendant was previously convicted of a felony involving the use or a threat of violence on other persons, and 2) that the defendant had committed the offense in an especially heinous and cruel manner. It found none of the statutory mitigating circumstances to be present. Based on its findings, the court sentenced the defendant to death. Subsequently, the defendant filed a Rule 32 petition claiming newly discovered evidence. The petition was denied. He appeals from the judgment and sentence and from the denial of his Rule 32 petition.

The defendant's appeal raises the following issues:

I. Did the trial court commit reversible error in submitting the case to the jury on a felony-murder theory?

II. Did the trial court err by admitting the defendant's extrajudicial statements into evidence?

III. Was the testimony of the defendant's accomplice corroborated?

IV. Did the trial court abuse its discretion by admitting the photographs of the corpse?

V. Did the trial court commit reversible error by refusing to grant the defendant's requests for mistrials which were based on the alleged inadmissibility of certain items accepted into evidence?

VI. Did the court commit reversible error in summarily denying the defendant a Rule 32 hearing in relief?

VII. Does the imposition and implementation of the death penalty constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?

VIII. Is the imposition of the death penalty excessive in this instance?

I.

The defendant submitted proposed instructions directing the jury not to consider any felony-murder instructions if they found that the robbery had been completed prior to the death of the victim. He contends that it was reversible error for the trial court to deny these instructions and permit a conviction for murder in the first degree based on a felony-murder theory.

In a leading case, the Missouri Supreme Court stated that the felony-murder statute, "applies where the initial crime and the homicide were parts of one continuous transaction, and were closely connected in point of time, place and causal relation, as where the killing was done

in flight from the scene of the crime to prevent detection, or promote escape." *State v. Adams*, 339 Mo. 926, 98 S.W.2d 632 at 637 (1936). The majority of American jurisdictions have remained in accord with this rule. Annot. 58 A.L.R.3d 851 (1974).

Here, the evidence shows that the actions which caused the victim's death transpired during or immediately following the robbery as a part of the chain of events which the defendant's deliberate acts had set in motion. The defendant and his accomplices were fleeing from their crime when the vehicle was driven over the victim. The victim's death was a direct and proximate result of the robbery and so constitutes first-degree murder. *State v. Hitchcock*, 87 Ariz. 277, 350 P.2d 681 (1960), *cert. denied*, 365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821. Furthermore, the escape was an essential part of the robbery.

Recently, we have said, "[W]hen the felony is so entwined with the murder that it is part of that murder we will not hold a stopwatch on the events or artificially break down the actions of the defendant into separate components in order to avoid the clear intent of the legislature in enacting the felony-murder rule." *State v. Richmond*, 112 Ariz. 228, 540 P.2d 700 (1975). Thus the facts in the instant case do not justify the instructions requested by the defendant and do support his conviction for felony-murder.

II.

The defendant contends that certain incriminating statements he made on September 11, 1973, while in custody were admitted at trial in violation of his Sixth Amendment right to counsel. At the time the statements were taken the defendant was already represented by the public defender on two unrelated murder charges. *See State v. Richmond*, *supra*, and *State v. Richmond*, 23 Ariz.App. 342, 533 P.2d 553 (1975). He had received a preliminary hearing and been bound over for trial on one

of the charges. Earlier that same day he had been arraigned on the other charge after the return of a grand jury indictment.

Two police officers came to "the holding tank" where the defendant had been returned after his arraignment, and served him with a warrant for his arrest on charges of robbing and murdering Bernard Crummett, the victim in this case. The officers read the defendant his *Miranda* rights and then recorded the statement he agreed to make.

They made no effort to contact the public defender before taking the statement; nor did they ask the defendant if he wished to summon the deputy public defender who was representing him on the other murder charges. Under similar circumstances, we have held that law enforcement officers are not under a constitutional duty to contact a lawyer for the accused if he makes a valid waiver of that right. *State v. Marks*, 113 Ariz. 71, 546 P.2d 807 (1976). *See also Biddy v. Diamond*, 516 F.2d 118 (5th Cir. 1975); *U.S. v. Zamora-Yescas*, 460 F.2d 1272 (9th Cir. 1972), *cert. denied*, 409 U.S. 881, 93 S.Ct. 210, 34 L.Ed.2d 136 (1972); *Coughlan v. U.S.* 391 F.2d 371 (9th Cir. 1968), *cert. denied sub. nom., Coghlan v. U.S.*, 393 U.S. 870, 89 S.Ct. 159, 21 L.Ed.2d 139 (1968).

The defendant also contends that his admissions were not preceded by a knowing, intelligent and voluntary waiver of his constitutional rights. The evidence taken at the voluntariness hearing controverts that contention. The defendant did not testify at the hearing nor did he introduce any evidence to support his allegation. Since the record of the hearing supports the conclusion of the trial court, the statements of the defendant were properly found to be voluntary. *State v. Durham*, 111 Ariz. 19, 523 P.2d 47 (1974); *State v. Hughes*, 104 Ariz. 535, 456 P.2d 393 (1969).

Along with his Sixth Amendment argument the defendant contends that his admissions must be suppressed because they were obtained in violation of EC 7-18 and

DR 7-104 of the Code of Professional Responsibility. These provisions forbid an attorney to converse with an opposing party outside the presence of that party's counsel. The defendant argues that the deputy county attorney violated the code when he used the defendant's statements which law enforcement officers had obtained by talking with the defendant outside the presence of his counsel.

The defendant does not allege, nor is there anything in the record which indicates, that the Pima County Attorney or staff were aware of that particular interrogation. Instead, he claims that as an indigent criminal defendant, dependent on publicly furnished counsel, he was denied a protection afforded to civil litigants with private counsel. We find no merit in that claim. The procedures for protecting the rights of criminal defendants have been outlined by the U. S. Supreme Court in such decisions as *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The cited portions of the Code of Professional Responsibility are generally assumed to be for the purpose of affording civil litigants some of the protection which the Constitution guarantees to criminal defendants. *State v. Nicholson*, 463 P.2d 633 (Wash.1969). As long as law enforcement officers comply with the requirements of the Constitution in the pursuit of their investigation, an incriminating statement which is freely and voluntarily given is admissible. The trial court found that the statement in question was freely and voluntarily given and that the police officers had complied with the requirements of *Miranda*. The record supports this finding, so it was not error to admit the statement.

III.

The defendant claims he was convicted solely on the basis of the uncorroborated testimony of an accomplice. No conviction shall be had on the testimony of an accomplice unless it is corroborated by other evidence which tends independently to link the defendant with the com-

mission of the offense. A.R.S. § 13-136.[1] The state argues that the witness, Faith Erwin, was not an accomplice. We have held that an aider or abettor in the commission of a crime is an accomplice. *State v. Rackley*, 106 Ariz. 424, 477 P.2d 255 (1970). In the instant case there was preconcert, in that Faith Erwin knew of the plan to rob Bernard Crummett before she accompanied him on his final automobile ride. *Cf. State v. Sims*, 99 Ariz. 302, 409 P.2d 17 (1965). While her participation was minor the fact that she joined in the venture establishes her as an accomplice.

The accomplice's testimony is amply corroborated. The results of the autopsy, the photographs of the victim's body at the scene of the crime, the discovery of a wallet similar to the victim's in the murder vehicle and the identification of the defendant as a frequent driver of that vehicle all tend to link the defendant with the offense. The most conclusive corroboration come from the defendant's own statement in which he admits striking and robbing the victim. Taken together, the evidence corroborating Faith Erwin's testimony is overwhelming.

In oral argument before us the state noted that the trial court failed to instruct the jury on the applicable principles of law concerning the necessity for corroboration of the testimony of an accomplice. In *State v. Howard*, 97 Ariz. 339, 400 P.2d 332 (1965), we held that the failure to give such an instruction when warranted, even though not requested by either side, is reversible error. In *State v. Brewer*, 110 Ariz. 12, 514 P.2d 1008 (1973), we modified that opinion.

> "[W]here the evidence of corroboration is overwhelming and the defendant does not request a corroboration of accomplice instruction, the giving of such an instruction on the courts' own motion is not mandated by our statute and the failure to give such an instruction should not be considered fundamental error." *State v. Brewer*, 110 Ariz. 12, 17, 514 P.2d 1008, 1013.

[1] This statute, in effect at the time of the defendant's trial, has since been repealed. Ch. 116, § 1, Session Laws 1976, 32d Leg., 2d Reg. Sess. (1976).

In light of the overwhelming evidence of corroboration in the instant case the failure to give a corroboration of accomplice instruction was not reversible error.

IV.

The defendant next claims that the trial court abused its discretion in admitting certain photographs of the victim's corpse because their prejudicial effect outweighed their probative value. At trial the defendant offered to stipulate to the identity of the victim and to his being run over by a vehicle as the cause of death. The state wanted to expand the stipulation to include the defendant striking the victim's head with a rock as a factor contributing to his demise. The defendant would not agree.

The discretion to admit or exclude gruesome photographs is vested in the trial court, and competent evidence will not be excluded simply because it may arouse emotions. *State v. Ferrari*, 112 Ariz. 324, 541 P.2d 921 (1975); *Young v. State*, 38 Ariz. 298, 299 P. 682 (1931). In addition to being relevant to the state's theory of the case, the exhibits corroborate Faith Erwin's testimony by pictorially representing some of the circumstances which she described, and some of the photographs were used by the pathologist to illustrate his testimony. Because their probative value had been established, the trial court did not err in admitting the photographs of the deceased.

V.

The defendant contends that the trial court committed reversible error by not granting his motions for mistrial when allegedly inadmissible and prejudicial evidence was introduced. He refers to three instances in the record to support his contention.

The first instance occurred during the voir dire examination of the prospective jurors. The prosecutor asked:

> "Q. Is there anyone on the panel who feels that the crimes or murder is any less serious when they occur when involved with narcotics addiction?"

No objection was lodged by the defendant at that time, and both the prosecutor and the defendant passed the jury panel. At the end of the case the defense did move for a mistrial because of the voir dire statement. Unless there has been a timely objection made at trial to a question asked during jury voir dire, we do not consider the matter on appeal. *Argetakis v. State*, 24 Ariz. 599, 212 P. 372 (1923); *Kinsey v. State*, 49 Ariz. 201, 65 P.2d 1141 (1937).

The second instance cited by the defense concerns the testimony of Faith Erwin on redirect examination by the prosecution. She testified that she had used heroin previously as well as on the day of the homicide. The defense objection to the prosecutor's question about who was present when she used heroin was sustained by the court. A motion for mistrial was denied. The defendant argues that the inference was left that he was present and somehow connected with this illegal activity.

The subject of Faith Erwin's heroin habit was introduced by the defense in cross-examination. The defense also brought out that for some two weeks before the homicide the witness had been using heroin every day. It further brought out that the witness was under the influence of heroin while she was with the defendant and Becky Corella on the day of the homicide. The trial judge's ruling in denying a mistrial was not an abuse of discretion because the matter had been developed by the defense on cross-examination. Any inference concerning drug use originated from testimony introduced by the defense.

The defense also urges that a mistrial should have been declared when the prosecution, on redirect examination,

asked Faith Erwin to whom she gave the money for an act of prostitution. She replied that it was to the defendant. The defense motion to strike was granted, but the motion for a mistrial was denied.

In addition to granting the defense motion to strike that testimony, the trial court instructed the jury to disregard both the question and answer. The defense argues that this was not sufficient to protect the defendant from the prejudice caused by the answer. To decide this issue we must examine the statement for its possible effect on the jury. *State v. Arroyo*, 99 Ariz. 68, 406 P.2d 734 (1965).

The total circumstances of the case disclose that the defendant was involved with persons connected with prostitution, and that the defendant used such association to carry out his scheme to rob the victim in this case. The defendant originally met the victim when he and Becky Corella approached the defendant and Faith Erwin to arrange an act of prostitution. The defendant took part in discussions which culminated in the defendant accompanying the others to the motel where Becky Corella performed an act of prostitution. Viewed in the light of circumstances shown by the admissible evidence, the action of the trial court in striking the questioned testimony and instructing the jury to disregard it was sufficient to overcome any prejudice to the defendant. The denial of a mistrial was not error.

The third instance complained of was the playing of the tape in which the defendant recounted his version of the circumstances surrounding the murder. In the course of his narration the defendant mentioned that he and Faith smoked marijuana while parked at the Birdcage awaiting Becky and that after dividing the proceeds of the robbery he and Faith "fixed up again." He also stated that Becky Corella was carrying a pistol on the night in question. The defendant argues that those isolated pieces of testimony painted him as a marijuana smoker, a dope addict

and a gun carrier, and that none of these facts is relevant to the crime charged.

Evidence of other crimes which the defendant may have committed is prejudicial and usually inadmissible. *State v. Tostado*, 111 Ariz. 98, 523 P.2d 795 (1974). One of the well-established exceptions to the general rule disallowing such evidence is the complete story exception.

> "[E]vidence of another offense, misconduct or prior bad acts is admissible to prove the complete story of the crime even though there is revealed other prejudicial facts, such as the defendant has committed other criminal offenses or misconduct." *State v. Collins*, 111 Ariz. 303, 305, 528 P.2d 829, 831 (1974).

See also State v. Villavicencio, 95 Ariz. 199, 388 P.2d 245 (1964); *State v. Evans*, 110 Ariz. 380, 519 P.2d 182 (1974).

The incidents described in the contested testimony are so blended with the commission of the instant offense that they explain the circumstances of the crime. *State v. Villavicencio, supra.* The defendant's description of the activities on the night of the crime provide evidence of his intent and plan. These clearly admissible items are so entwined with the other bad acts that it is virtually impossible to separate them. The defendant's explanation of the events which happened preceding and subsequent to the homicide were admissible in order that the full story could be understood. There was no error in the admission of the evidence.

VI.

The defendant contends that the trial court erred in summarily denying him a hearing on his Rule 32 post-conviction relief petition. The defendant appended to his petition affidavits from two witnesses who allegedly would testify that Becky Corella had told them that she, rather than the defendant, was driving the vehicle when it ran over Bernard Crummett. Based on his contention that the

robbery had been terminated before the victim was crushed by the vehicle, the defendant argues that these affidavits present newly discovered material facts which would have changed the verdict had they been introduced at trial. Such a ground is within the scope of Rule 32.1. He further argues that he was entitled to an evidentiary hearing pursuant to Rule 32.8, Arizona Rules of Criminal Procedure, 17 A.R.S. In the language of the comment to Rule 32.6:

> "If the court finds from the pleadings and record that all of the petitioner's claims are frivolous and that it would not be beneficial to continue the proceedings, it may dismiss the petition. . . . However, if the court finds any colorable claim, it is required by *Townsend v. Sain*, 83 S.Ct. 745, 372 U.S. 293, 9 L.Ed.2d 770 (1963) to make a full factual determination before deciding on its merits."

To be colorable, a claim has to have the appearance of validity, i.e., if the defendant's allegations are taken as true, would they change the verdict? We are satisfied that they would not. The newly discovered evidence must be such that it dies not merely bolster, impeach or contradict testimony offered at the trial. *State v. Morrow*, 111 Ariz. 268, 528 P.2d 612 (1974). The statements of the defendant's affiants merely contradict Faith Erwin's testimony that the defendant was driving.

Furthermore, we have rejected the defendant's theory that the escape was not a part of the robbery. *See* I, *supra.* Arizona law states that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission, are principals in any crime so committed. A.R.S. § 13-139. The record demonstrates that the defendant instigated the robbery, battered the victim into unconsciousness and took his belongings. All who participate in the commission of a crime are equally guilty as principals. *State v. Collins, supra.* Even if we accept as true the de-

fendant's allegation in his Rule 32 petition, we must find him criminally liable for this murder regardless of whether he or his accomplice was driving the vehicle at the time in question.

VII.

The defendant challenges the constitutionality of the death penalty and Arizona's death penalty statute, A.R.S. § 13-454. The Federal Supreme Court has declared that the imposition of the death penalty for the crime of murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments of the United States Constitution. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Nor does it violate the Arizona Constitution. We addressed this issue in *State v. Endreson*, 108 Ariz. 366, 498 P.2d 454 (1972) and in that pre-*Furman* case ruled as a matter of state constitutional law that the death penalty is not cruel and unusual punishment under Article 2, § 15 of the Arizona Constitution. *See also State v. Maloney*, 105 Ariz. 348, 464 P.2d 793 (1970); *State v. Malumphy*, 105 Ariz. 200, 461 P.2d 677 (1969); *State v. Jones*, 95 Ariz. 4, 385 P.2d 1019 (1963). We have found nothing to persuade us to depart from our rule in *Endreson* that the imposition of the death penalty does not violate the Arizona Constitution.

As part of his broad attack on Arizona's system, the defendant argues that prosecutorial discretion, plea bargaining, jury discretion to convict on a lesser-included offense and the possibility of sentence commutation or executive clemency are mechanisms of the arbitrary selectivity found unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). This point was raised in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976):

> "The existence of these discretionary stages is not determinative of the issues before us. . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." 428 U.S. 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859, 889.

The defendant contends that standards to guide a sentencing body are impossible to formulate. The *Gregg* court held that a statute which gives the sentencing authority "adequate information and guidance" would meet the concerns expressed in *Furman*. *Gregg v. Georgia*, 428 U.S. 195, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, 887 (1976). Arizona's system for the imposition of the death penalty, based on aggravating and mitigating circumstances, insures that the sentencing authority is given adequate information and guidance.

The defendant further contends that the legislative criteria are too vague and subjective to satisfy *Furman*. In *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the United States Supreme Court was faced with similar challenges to a capital sentencing procedure which, in this context, is indistinguishable from the Arizona statute. *State v. Murphy*, 113 Ariz. 416, 555 P.2d 1110 (1976). That court stated:

> "The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones." *Proffitt v. Florida*, 428 U.S. 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913, 926 (1976).

We conclude that the Arizona statute satisfies the requirements of due process and equal protection.

The defendant argues that the statutory method for determining sentence after the special verdict has been returned is unconstitutionally ambiguous.[2] According to

[2] "D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into

the defendant's theory, because the subsection does not specifically limit the mitigating circumstances which could be considered by a trial court to those enumerated in subsection F, it allows the judge to consider any mitigating circumstances he chooses. The defendant also contrasts the language in subsection E, "aggravating circumstances to be considered shall be the following: . . ." with the language in subsection F, "mitigating circumstances shall be the following: . . ." We find his construction of the statute to be incorrect.

The purpose of A.R.S. § 13-454 is to confine the discretion of the sentencing authority within defined limits. We reject the defendant's construction and hold that subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F. For the same reason we find the argument that the statute allows the trial judge to impose the death sentence even if no aggravating circumstances are found to be an incorrect interpretation of A.R.S. § 13-454. *See State v. Murphy, supra.*

The defendant finally argues that it is unconstitutional to leave the determination of sentence to the judge. The Supreme Court rejected that argument in *Proffitt v. Florida, supra*, by declaring that it had never suggested that jury sentencing was constitutionally required.

When a death sentence is imposed appeal is automatic, 17 A.R.S. Rules of Criminal Procedure, Rule 31.2(b), and A.R.S. § 13-1711 vests jurisdiction in this court. Because of the unique severity of the penalty we will accord prompt consideration to appeals from an imposition of the death sentence.

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account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-454.

The legislature charged this court with the duty to correct sentences which are illegal and sentences where we find that the punishment imposed is greater than the circumstances of the case warrant. A.R.S. § 13-1717. It has been our policy not to disturb the sentence imposed by the trial court, absent a clear abuse of discretion, when it is within the statutory limits. *State v. Toney*, 113 Ariz. 404, 555 P.2d 650 (1976); *State v. Moody*, 67 Ariz. 74, 190 P.2d 920 (1948). However, the gravity of the death penalty requires that we painstakingly examine the record to determine whether it has been erroneously imposed. *State v. Maloney, supra.* Furthermore, because A.R.S. § 13-454 sets out the factors which must be found and considered by the sentencing court, we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances, *e.g., State v. Murphy, supra; State v. Verdugo*, 112 Ariz. 288, 541 P.2d 388 (1975). We must determine for ourselves if the latter outweigh the former when we find both to be present.

In performing this review we find it necessary to determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factors; whether the evidence supports the sentencing court's finding the existence of a statutory aggravating circumstance(s); whether the evidence supports the sentencing court's finding the absence of the statutory mitigating circumstance(s); whether mitigating circumstances found to be present are sufficiently substantial to call for leniency; and, whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Accord Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974), *aff'd, Gregg v. Georgia, supra* (1976). Because A.R.S. § 13-454(C) directs the court to set forth in writing its findings on the existence or nonexistence of each of the circumstances, a meaningful appellate review of each death sentence is facilitated.

VIII.

The defendant's final contention is that the imposition of the death penalty is excessive. In this case the sentencing court found two aggravating circumstances to be present: 1) the defendant was previously convicted of a felony in the United States involving the use of a threat of violence on another person, and 2) the defendant committed the offense in an especially heinous, cruel or depraved manner.

The state submitted copies of the defendant's photograph, fingerprint record and commitment order, all certified by the Arizona State Prison Records Officer. The state also called the victim in the prior conviction, and that witness identified the defendant as the one who had kidnapped him at knifepoint. The sentencing court did not err in finding the existence of the first aggravating circumstance. A.R.S. § 13-454(E)(2).

The defendant argues that the terms "an especially heinous, cruel, or depraved manner" are so imprecise and indefinite as to leave the discretion of the sentencing authority virtually unfettered. Because the second aggravating circumstance has been established a resolution of this issue is not necessary. We note, however, that the Florida Supreme Court defined strikingly similar terms [3] as being directed only at the conscienceless or pitiless crime which is unnecessarily torturous to the victim. *State v. Dixon*, 283 So.2d 1 (Fla.1973); *see also Alford v. State*, 307 So.2d 433 (Fla.1975); *Halliwell v. State*, 323 So.2d 557 (Fla.1975). This construction was found not to be impermissibly vague by the United States Supreme Court. *Proffitt v. Florida, supra.*

At the sentencing hearing the defendant called two psychiatrists in an attempt to place the first mitigating

[3] "The capital felony was especially heinous, atrocious, or cruel." Fla.Stat. § 921.141(5)(h), F.S.A.

circumstance into issue. That circumstance reads as follows:

> "F. Mitigating circumstances shall be the following:
>
> "1. [Defendant's] capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13-454(F)(1)

This circumstance can be established by demonstrating either of two conditions: an impairment of the capacity to appreciate wrongfulness or an impairment of the capacity to conform. In neither case need the impairment be so great as to constitute a defense to prosecution.

The first condition involves a cognitive deficiency. Under Arizona law, when a defendant's capacity to appreciate the wrongfulness of his conduct is totally impaired that constitutes a defense to prosecution under the M'Naghten rule because the defendant did not know what he was doing was wrong. *State v. Sisk*, 112 Ariz. 484, 543 P.2d 1113 (1975); *Lauterio v. State*, 23 Ariz. 15, 201 P. 91 (1921); M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Reprint 718 (1843). By enacting A.R.S. § 13-454(F)(1), the legislature has directed the sentencing court to take into account as a mitigating circumstance a deficiency in the cognitive process, which while significant, is insufficient to constitute a defense to the crime.

The second condition raises an issue heretofore not found in this state's criminal law. A.R.S. § 13-454(F)(1) directs the sentencing court to consider a significant impairment of the defendant's capacity to conform his conduct to the requirements of law. Thus, the legislature has authorized an inquiry into the volitional aspects of the human mind for the limited purpose of determining the sentence to be imposed on persons already convicted of first-degree murder. Because this provision in no way disturbs this state's long-standing adherence to the

M'Naghten rule of criminal responsibility, no impairment, no matter how great, of a defendant's volitional capacity can constitute a defense to crime. *See State v. Schantz*, 98 Ariz. 200, 403 P.2d 521 (1965).

The psychiatric testimony offered by the defendant characterized him as a sociopath, that is, a person with a character or personality disorder. The threshold question presented is whether a character or personality disorder qualifies as an impairment within the meaning of A.R.S. § 13-454(F)(1). We believe it does not.

Our conclusion that character or personality disorders are not mitigating circumstances within the meaning of the statute is based upon an analysis of the section in question and its origin.

The impairment of capacity described in A.R.S. § 13-454(F)(1) is one which is significant but not to such a degree to constitute a defense. For an impairment to be considered a defense, an accused must be suffering from a mental disease or defect which renders him unable to appreciate the nature or wrongfulness of his conduct. *State v. Schantz, supra.* A psychopathic or sociopathic condition has never been accepted as a defense to a criminal act in Arizona. *State v. Crose*, 88 Ariz. 389, 357 P.2d 136 (1960).

In the Mental Health Code the legislature has defined mental disorders as excluding character and personality disorders. A.R.S. § 36-501(18). This indicates another instance when the legislature has distinguished between significant mental disorders and character and personality disorders.

Of greater significance, however, is the fact that the language adopted by the legislature for the section in question is similar to that used in the Model Penal Code [4]

[4] "Section 4.01. Mental Disease or Defect Excluding Responsibility.

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirement of law.

"(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." Model Penal Code, § 4.01 at 66 (Proposed Official Draft, 1962).

of the American Law Institute. The Model Penal Code excludes character or personality disorders as an element excusing criminal responsibility. The reason for such exclusion is explained in the comments to the model code:

> "The reason for the exclusion is that, as the Royal Commission puts it, psychopathy 'is a statistical abnormality that is to say, psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality.'" Model Penal Code, Comments § 4.01 at 160 (Tentative Draft No. 4, 1956.)

See also Cleckley, *The Mask of Sanity* (Fourth Edition 1964); Cavanagh, *Problems of a Psychiatrist in Operating Under the M'Naghten, Durham and Model Penal Code Rules*, 45 Marquette Law Review 478 (1962); Symposium, *The Socoipathic Criminal Offender: What To Do With Him?* 34 University of Cincinnati Law Review 1 (1965).

We are convinced that the legislature was influenced by the position of the American Law Institute concerning personality or character disorders. We conclude that the legislature did not mean to include such disorders as mitigating circumstances in determining the penalty for first-degree murder.

The burden of establishing mitigating circumstances is on the defendant. A.R.S. § 13-454(B). Because both of the defendant's expert witnesses characterized him as

a sociopath the sentencing court was correct in finding the absence of the first mitigating circumstance. In our review we do not find evidence of the presence of any of the other statutorily prescribed mitigating circumstances.

If the superior court finds one or more of the aggravating circumstances and no mitigating circumstances, it shall impose the sentence of death. A.R.S. 13-454 (D). A similar statutory scheme was approved in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The superior court correctly applied the statute in the instant case.

Pursuant to A.R.S. § 13-1715 we have reviewed all of the rulings and the findings of the superior court on the convictions and sentence of the defendant. We find no reversible error.

Judgment of conviction and sentence affirmed.

CAMERON, C. J., STRUCKMEYER, V. C.J., and HAYS and GORDON, JJ., concur.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

(Caption Omitted in Printing)

[EXCERPT OF PROSECUTING ATTORNEY'S ARGUMENT, RESENTENCING HEARING HELD ON MARCH 13, 1980]

[TRANSCRIPT PAGES 86-87]

* * * *

With regard to Aggravated Circumstances No. 6, it is the State's position that the evidence in this case, which this Court heard and which the Court has agreed it will consider in accordance with the statutes, which establishes that this offense was one that was committed in a particularly heinous, cruel and depraved manner. I would ask the Court to take the fact that Mr. Bernard Crummet was beaten by Mr. Richmond with his fists. Then while he was down on the pavement, he was beaten by Mr. Richmond with rocks. He was then run over with a car twice. That is a particularly cruel and heinous way in which to commit the crime of murder, which is likely to cause a great amount of anguish, fear, pain and suffering to the victim. Obviously, we are unable to call the victim as a witness to establish those elements, but I think circumstantially the evidence in this case establishes that.

And I would ask the Court to read State vs. Richmond; the initial decision. Again, I am sure, as the Court has noted, the Supreme Court did not rule on whether or not they agreed with this Court in its previous ruling

with regard to Aggravating Circumstance No. 6; and so there is no guidance in that decision other than their reference to Florida cases. The State would still urge that this is a crime that was committed in a particularly cruel and heinous manner and that Aggravating Circumstance No. 6 has, in fact, been established in this case.

* * * *

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

(Caption Omitted in Printing)

[EXCERPT OF DEFENSE COUNSEL'S ARGUMENT, RESENTENCING HEARING HELD OF MARCH 13, 1980]

[TRANSCRIPT PAGES 93-97]

* * * *

MR. MINKER: Well, we then come to Circumstance No. 6, which is the State's fourth alleged aggravating circumstance.

At this time, I wish to call the Court's attention to two cases within the last six months, which deal with the subject of what is especially cruel, henious or depraved under Arizona law. The first case I want to call the Court's attention to, *State* vs. *Brookover*, Supreme Court No. 4426. This case was filed on October 2nd, 1979 in the Arizona Supreme Court. The Arizona Supreme Court set aside the death penalty in that case because it found that the trial court was incorrect in coming to the conclusion that the killing in that case took place in an especially cruel, heinous and depraved manner. The facts in that case, which the trial court found, were that "the murder of Gregory Case, by shooting him in the back and while helpless on the floor, for either or both of the reasons mentioned, is an especially heinous, cruel and depraved act."

Despite that finding by the trial court, the Arizona Supreme Court held that that was wrong and discussed —I am reading now—"The Florida Supreme Court has discussed the meaning of 'heinous,' 'atrocious,' and

'cruel' as applied to conduct which may be considered in applying the death penalty." I am quoting now from *State* vs. *Dixon*, a Florida case which is cited within Brookover.

"It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with other indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is necessarily torturous to the victim."

The Supreme Court then discussed *State* vs. Watson and recalled how in *State* vs. *Watson* that it found that cruel and heinous was not to be applied to that killer. Then in the Brookover case, the Court went on to say: "In the instant case, the victim was shot twice in the back. While certainly cowardly, it was not done in a particularly cruel or depraved manner. This was not a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' The actions of the defendant did not set his acts apart from the norm of first degree murder."

The other case that I wish to call to the Court's attention is *State* vs. *Lujan*, L-u-j-a-n; No. 4423; filed November 26, 1979 by the Arizona Supreme Court.

In *State* vs. *Lujan*, the court recalled language from its own earlier case of *State* vs. *Knapp*. The court said that the words "heinous, cruel or depraved" have meanings that are clear to a person of average intelligence and understanding. Webster's Third New World International Dictionary defines them as follows: "Heinous: hatefully or shockingly evil; grossly bad;" "Cruel: disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic;" "Depraved: marked by debasement, corruption, perversion or deterioration."

The text of Lujan goes on further to say: "Moreover, it is important to emphasize that A.R.S. 13-456 E.6 requires that the killing be especially—" and the court underlined the word especially—"especially heinous, cruel or depraved. The manner in which the murder was committed must be such as to—" and then it quotes the language from Brookover.

"In determining whether a murder has been committed in an especially heinous or depraved manner, we must necessarily consider the killer's state of mind at the time of the offense. This state of mind may be shown by his behavior at or near the time of the offense. Thus we have found those additional factors which make murder especially heinous or depraved." Then the court goes on to consider some previous cases in which it did find those conditions to be present. It cites, for example, in 114 Az. 199, *State* vs. *Blazak* as discussed in *State* vs. *Knapp* and *State* vs. *Ceja*, 115 Az. 413.

Then this case, this case Lujan, the court considers what the trial judge observed and found.

"The trial judge relied on the following factors: the helplessness of the victim; the lack of of necessity for the killing to accomplish the defendant's plan to steal; and the magnitude of the wound inflicted demonstrating a clear intent to kill. We agree with the trial court that these factors existed, but we do not agree that they indicate that the killing was accomplished in an especially heinous or depraved manner."

I think these two cases, Your Honor, argue well that the State has not borne its burden today or this week in showing that the August, 1973 killing of Bernard Crummet was committed in an especially cruel, heinous or depraved manner by Willie Richmond. Those factors which the Court, our Court, has discussed has simply not appeared in the record as the State is required to show them. The statute requires, Your Honor, that the aggravating circumstances be weighed against the mitigating circumstances. The only test the statute suggests

or commands is for the Court to determine whether or not the mitigating circumstances are sufficient to call for leniency; that is, if my recollection of the exact test of the statute is accurate.

When I began yesterday morning, Your Honor, I began to list the mitigating factors in this case.

THE COURT: I believe we have gone into that phase of your argument.

• • • •

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

(Caption Omitted in Printing)

[EXCERPT OF MINUTE ENTRY DATED MARCH 13, 1980, JUDGMENT AND SENTENCE]

[MINUTE ENTRY PAGES 3-5]

• • • •

Both sides state they have no further evidence to offer.

Counsel argue to the Court.

No legal cause having been shown to the Court why sentence should not be announced,

As to Count I, pursuant to section 13-454(c), the Court returns the following special verdict as to the findings of existence and nonexistence of circumstances set forth in subsections (e) and (f).

As to subsection (e), that is the aggravating circumstances to be considered.

As to item 1,

THE COURT FINDS that the Defendant has been convicted of another offense in the United States, for which under Arizona law a sentence of life imprisonment was imposable, that being case no. A-24176 in the Superior Court of Pima County, State of Arizona.

As to that finding,

THE COURT FURTHER FINDS that if this case is not properly includable under this section, it is properly includable under item 2.

As to item 2,

THE COURT FINDS that the Defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person, that being case no. A-17969, in the Superior Court of Pima County, State of Arizona.

As to items 3, 4 and 5,

THE COURT FINDS nonexistence of those items.

As to item 6,

THE COURT FINDS that the Defendant did commit the offense in this case in an especially heinous and cruel manner.

As to subsection (f), mitigating circumstances.

As to item 1,

THE COURT FINDS that the Defendants' capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was not significantly impaired.

As to item 2,

THE COURT FINDS that the Defendant was not under unusual or substantial duress.

As to items 3 and 4,

THE COURT FINDS nonexistence of those items.

As to item 5, as to the Defendant's age, the Court will make a finding on that also.

THE COURT FINDS that the Defendant was aged twenty-five years at the time of the offense and finds that the age in this case is not a mitigating factor.

The defense having raised certain specific items for the Court's consideration as mitigating factors and having requested that the Court make findings as to those mitigating factors, the Court will do so.

As to item 1,

THE COURT FINDS that Rebecca Corrella was involved in the offense but was never charged with any crime.

As to item 2,

THE COURT FINDS that Faith Irwin was involved in the offense but was never charged with any crime.

As to item 3,

THE COURT FINDS that the victim had engaged in an illegal act of prostitution with Rebecca Corrella near the time of the offense, and,

THE COURT ALSO FINDS that the victim had solicited an illegal act of prostitution with Faith Irwin, a minor, near the time of the offense.

As to item 4,

THE COURT FINDS that the jury was instructed both on the matters relating to the felony murder rule, as well as matters relating to premeditated murder.

As to item 5,

A finding has already been made.

As to item 6,

The Defense claims that the character of the Defendant has changed substantially for the better since the time of the conviction of the offense, and to this item, the Court is unable to make a definitive finding.

As to item 7,

THE COURT FINDS that the Defendant's family is supportive of the Defendant and will suffer considerable grief as a result of any death penalty that might be imposed.

The Court has considered all of the items raised by the Defense on the question of mitigating circumstances.

THE COURT FURTHER FINDS that considering both the enumerated circumstances in the statutes and the enumerated circumstances raised by the Defense, and having considered them separately and as a whole,

THE COURT FINDS that there are no mitigating circumstances sufficiently substantial to call for leniency.

The jury having heretofore returned a verdict of GUILTY to FIRST DEGREE MURDER, and,

The Court having heretofore entered a judgment of GUILT as to that charge on February 27, 1974,

IT IS THE JUDGMENT OF THE COURT that the Defendant be sentenced to Death.

• • • •

KATHY CLINE
Deputy Clerk

SUPREME COURT OF ARIZONA
EN BANC

No. 2914

STATE OF ARIZONA,
Appellee,

v.

WILLIE LEE RICHMOND,
Appellant.

May 12, 1983

Rehearing Denied June 28, 1983

HOLOHAN, Chief Justice.

Appellant, Willie Lee Richmond, was found guilty of first degree murder on February 5, 1974, and was sentenced to death. This court affirmed the conviction and the sentence in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977). However, we later vacated the death sentence pursuant to *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979), and remanded for resentencing.

After a sentencing hearing, appellant again was sentenced to death, from which sentence he now appeals. Additionally, appellant asks that we review the denial of his petition for post-conviction relief. We have jurisdiction pursuant to A.R.S. § 13-4031 and Rule 32.9, Arizona Rules of Criminal Procedure, 17 A.R.S.

The conviction arose from a 1973 incident where appellant and his 15-year-old girlfriend, Faith Erwin, accompanied Becky Corella and Bernard Crummett to a Tucson motel. Becky had arranged to perform an act of prostitution with Crummett. Becky informed appellant that Crummett was "loaded." Appellant decided to rob Crummett.

Appellant accompanied by the two women and Crummett drove to a deserted area outside Tucson ostensibly for Crummett to engage in another act of prostitution with Becky. Appellant stopped the car feigning a flat tire. Appellant alighted from the car and went to the passenger side where he pulled Crummett from the car. Appellant knocked Crummett to the ground, and, as Crummett lay on the ground, appellant hit him with several large rocks, causing Crummett to lose consciousness. Becky took the victim's watch and wallet from his pockets. Appellant and the two women left Crummett lying unconscious on the ground, but, before leaving, the vehicle was twice driven over him.

Medical testimony revealed that Crummett died of a compressive injury to the skull consistent with the excessive force of a wheel of a car. At trial Faith Erwin testified that appellant was the driver of the automobile when it was driven over the victim. Appellant claimed that Becky Corella was the driver.

NOTICE

Appellant claims a violation of his sixth amendment right to know the nature and cause of the accusation against him because the information did not put him on notice that he coud receive the death penalty, nor did it state what aggravating factors would be presented. Appellant did not raise this issue at the time he appealed his conviction, but, as we are required, pursuant to A.R.S. § 13-4035, to search the record for fundamental error, we will address this issue. Appellant was charged with first

degree murder in violation of A.R.S. § 13-451, § 13-452 and § 13-453.[1] At that time § 13-453 provided that "a person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life." In *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694 (1982), we addressed the issue raised by appellant, and we held that an indictment charging first degree murder was sufficient on its face to inform the defendant of the crimes charged and the sentences which could be imposed. Due process requires that a defendant be advised of the specific charges against him. The information in this case gave appellant adequate notice of the charges. There is no requirement that a defendant be advised in the indictment or information of the statutory penalty, or that he be advised what aggravating circumstances will be presented at sentencing in the event of a conviction.

SPEEDY TRIAL

Appellant was first sentenced to death in February of 1974. He was resentenced to death in 1980. Now appellant claims he was denied his right to a fair and speedy sentencing, and that he was prejudiced by the six-year gap which deprived him of the ability to effectively present his case for mitigation. We addressed this issue in *State v. Blazak*, *supra*, where we stated, "[n]either this court nor the United States Supremt Court has found that the right to a speedy trial extends to sentencing." 131 Ariz. at 600, 643 P.2d at 696, citing *State v. Steelman*, 126 Ariz. 19, 612 P.2d 475 (1980).

The delay resulted in the appellant having an opportunity to present additional evidence as mitigation. Additionally, appellant has failed to show how he was prejudiced. He was afforded the opportunity to present his original mitigating evidence as well as any additional mitigating factors which may have been omitted in the

[1] These are section numbers under the old criminal code, they have since been renumbered or repealed.

first sentencing hearing or which have arisen since that hearing. The sentence he received at his resentencing was no harsher than the original sentence. We are unable to find any prejudice resulting from the delay.

RESENTENCING UNDER WATSON

On numerous occasions this court has heard and rejected arguments that resentencing under *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied* 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979) is unconstitutional. Appellant asserts several grounds for this argument claiming the resentencing is: (1) a violation of ex post facto prohibitions; (2) a violation of double jeopardy prohibitions; and (3) a violation of the due process and separation of powers requirements because it is a judicially created penalty. We have addressed these issues many times before with resolutions adverse to appellant. *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983); *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694 (1982); *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825, *cert. denied*, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980). These arguments have also been considered and rejected by the Ninth Circuit Court of Appeals in *Knapp v. Cardwell*, 667 F.2d 1253, *cert. denied*, —— U.S. ——, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

SENTENCING CHALLENGES

The sentencing procedure is contested by appellant on three other grounds. First, that he was denied his alleged constitutional right to have a jury decide the presence of aggravating or mitigating circumstances. We have previously rejected this argument. *State v. Gretzler*, *supra*; *State v. Blazak*, *supra*; *State v. Watson*, *supra*. Second, appellant contends it is unconstitutional to place the burden of proof of mitigating circumstances on the defendant. Once the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the

defendant to establish mitigating circumstances. As we stated in *State v. Smith*, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980), "[f]acts which would tend to show mitigation are peculiarly within the knowledge of a defendant."

Third, appellant claims he was denied his right to be sentenced by an impartial trier of fact. This contention is based on evidence which was introduced at the original sentencing. At the first sentencing hearing, defense counsel presented psychiatric testimony which classified appellant as a sociopath or psychopath. This condition was described as one who never learns from experience, has poor impulse control, has a lack of moral insight and shows very little guilt. The psychiatrists characterized appellant as callous, grossly selfish, irresponsible and impulsive. This testimony was introduced as mitigation.

Under the Arizona death penalty statute in effect at the time, the judge could consider *only* four enumerated factors as mitigation. One of the statutory mitigating circumstances was that "the defendant's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." [2] The psychiatric testimony was intended to show the existence of this particular mitigating factor. The judge did not find this factor to exist.

Five years later, when this court ordered a resentencing, the case was returned to the original trial judge. Appellant's request for a change of judge was denied by the presiding judge.[3] At the time of the resentencing, the Arizona death penalty statute, A.R.S. § 13-703, required that the judge who heard the case also conduct the sen-

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[2] Former A.R.S. § 13-454(F)(1), renumbered as A.R.S. § 13-703(G)(1).

[3] The motion was denied because it was not timely made. We will, however, examine this contention for fundamental error.

tencing. *State v. McDaniel*, 127 Ariz. 13, 617 P.2d 1129 (1980). The statute has recently been amended to allow a judge other than the trial judge to conduct the sentencing hearing if the trial judge has died, resigned, or become incapacitated or disqualified.

A litigant is entitled to an impartial judge at any stage of the proceedings. *See, State v. Barnes*, 118 Ariz. 200, 575 P.2d 830 (App.1978). However this does not include a judge totally ignorant of the previous proceedings. Any judge who might have conducted the resentencing in this case would have before him the record of the trial and the original sentencing hearing. Appellant presents no evidence that the sentencing judge entertained actual bias or prejudice against him. We stated in *State v. Greenawalt*, 128 Ariz. 150, 168, 624 P.2d 828, 846 *cert. denied*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981), "evidence is not inadmissible simply because it paints a black picture of the defendant's character or his bent for evil." Without some specific showing of bias on the part of the sentencing judge, we cannot say appellant was prejudiced or deprived of due process. From time to time appellate courts send cases back to a trial court for resentencing. The fact of resentencing is not sufficient, standing alone, to infer bias or prejudice.

The psychiatric evidence of the first mitigation hearing was not used in the second hearing, and there was no reference to that evidence in the second hearing.

Additionally, in each case where the death penalty is imposed, this court conducts an independent review of the record to assure a just result. We have reviewed the record in the instant case, and find no evidence of prejudice exhibited by the sentencing judge.

FELONY MURDER AND THE DEATH PENALTY

The jury which convicted appellant was instructed on both theories of first degree murder—premeditation and felony murder. The jury returned a verdict of first

degree murder. There is no indication in the record whether the jury's verdict was based on premeditation or felony murder.

The appellant contends that under the state of the record in this case the penalty of death cannot be imposed. The United States Supreme Court recently discussed the issue of felony murder in *Enmund v. Florida*, —— U.S. ——, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The Court observed:

> Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which a murder was committed.

Id. at ——, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152. The Court concluded that death was not a valid penalty for one who neither took life, attempted to take life, nor intended to take life.

By comparison, in the instant case appellant was an active participant. Appellant admitted he planned the robbery, drove the victim into the desert and knocked the victim unconscious to rob him. Faith Erwin testified that appellant threw rocks at the victim after he knocked him to the ground. Bloody rocks were found at the scene. The medical examiner testified that there were two kinds of force applied to the victim's skull—one which was consistent with the automobile tire and another in which there was external application of a pointed object. There is, however, no evidence that the latter force alone would have killed the victim.

Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of

Enmund. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. Appellant contends that Becky Corella was the one who drove the car over the victim. There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.

The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony. The circumstances show that appellant was the driver when the group left for the desert. The other woman, Becky Corrella, was so short in stature that it was difficult for her to operate an automobile. Appellant was the leader of the group and directed the operation. With such support we believe the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim.

Under either version of the facts appellant does not fit within the sphere of defendants the *Enmund* court seeks to protect from capital considerations. The evidence in this case shows that appellant intended to take a life.

PRIOR CONVICTION

Appellant was convicted in the instant case on February 5, 1974. He was convicted of another murder on August 9, 1974, even though that murder had occurred before the murder in the instant case. At the resentencing in 1980 the State sought to use this later conviction as an aggravating factor. Appellant argues this was improper.

A.R.S. § 13-703(F) enumerates aggravating circumstances which should be considered in determining the imposition of the death penalty. A.R.S. § 13-703(F)(1) states that "the defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." Citing *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982), appellant contends the trial court erred in finding this aggravating circumstance.

In *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), this court stated:

> Convictions entered prior to a sentencing hearing may thus be considered regardless of the order in which the underlying crimes occurred, *State v. Jordan*, [*supra*,] or the order in which the convictions were entered. [*State v. Valencia*, 124 Ariz. at 139, 602 P.2d at 807, 809 (1979)].
>
> Any language suggesting the contrary in *State v. Ortiz*, *supra*, [131 Ariz. at 210-11, 639 P.2d at 1035-36] is hereby disapproved. In *Ortiz*, we found the trial court erred in considering a contemporaneous conviction for conspiracy to commit murder as aggravation for the murder. This exclusion from consideration is best understood as having been required because both convictions arose out of the same set of events.

135 Ariz. at 57, n. 2, 659 P.2d at 16, n. 2.

In light of the language in *Gretzler*, the trial court did not err in finding the prior murder conviction to be an aggravating circumstance.

CRUEL AND HEINOUS

The trial court found as another aggravating factor that the offense had been committed in an especially cruel and heinous manner pursuant to A.R.S. § 13-703 (F)(6) which provides: "The defendant committed the offense in an especially heinous, cruel or depraved manner." Appellant contends this was error.

"Cruel" has been defined as "disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic." *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Cruelty involves the victim's pain or suffering before death. *State v. Gretzler*, *supra*; *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). The offense must be committed in an *especially* cruel, heinous or depraved manner to be considered an aggravating circumstance. *State v. Lujan*, *supra*. We do not find the offense to be especially cruel; there is no evidence in the record to indicate the victim suffered more pain than that of the initial blow which rendered him unconscious.

"Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp*, *supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler*, *supra*; *State v. Poland*, *supra*; *State v. Lujan*, *supra*. In *Gretzler*, *supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of

the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

The presence of any one of the three elements—cruel, heinous, or depraved—is sufficient to constitute an aggravating circumstance. *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980). We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979). The trial court was correct in finding the offense was committed in an especially heinous manner. It is also evident that the trial court could have found that the offense was committed in an especially depraved manner.

Appellant argues in the alternative that the "cruel, heinous and depraved" language of Arizona's death penalty statute is unconstitutionally vague and broad. We have addressed this contention in *State v. Gretzler*, *supra*, and found no constitutional infirmity in the statute.

The trial court judge did not find that "the defendant committed the offense as a consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703(F)(5). The trial court judge was under the mistaken belief that this subsection only applied to the "contract" type murder. Appellant was sentenced on March 13, 1980. This was prior to our decision in *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed. 2d 612 (1980), where we specifically held that this aggravating circumstance is not limited to the "hired gun" or "contract" type killing. In *Clark* we stated that this subsection applies to any murder committed for financial gain.

The state addressed this issue in its answering brief, but did not raise the issue through a cross-appeal. Thus, we need not reach the issue of the propriety of this court finding an additional aggravating circumstance which was not found by the trial court.

MITIGATING CIRCUMSTANCES

At the 1980 sentencing hearing appellant presented evidence of his conduct in prison since 1974 when he first went to death row. Testimony was received from members of appellant's family, his friends, and from prison counselors which related appellant's good character, the change in attitude he has undergone and his attempts to better himself. Appellant contends the trial court erred in failing to find his improved conduct and character to be a mitigating circumstance. Appellant cites *State v. Watson (II)*, 129 Ariz. 60, 628 P.2d 943 (1981), where very similar evidence was presented as mitigation. There we held that the evidence could and should be considered a mitigating circumstance. While it would have been an arbitrary decision had the court refused to consider the evidence, it is clear from the record the court *did* consider the evidence but found it unpersuasive.

INDEPENDENT REVIEW

The sentencing statute, A.R.S. § 13-703, provides that the death penalty shall be imposed if the court finds one or more aggravating circumstances and "there are no mitigating circumstances sufficiently substantial to call for leniency." In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give each. We also independently determine the propriety of the sentence. *State v. Gretzler, supra, State v. Blazak, supra.* The trial court correctly found three aggravating circumstances: first, that the defendant has been convicted of an offense (murder) for which life imprisonment or

death was imposable, A.R.S. § 13-703(F)(1); second, that the defendant has been convicted of a felony (murder and kidnapping) involving the use or threat of violence, A.R.S. § 13-703(F)(2); third, that the offense was committed in an especially heinous manner, A.R.S. § 13-703(F)(6).

As mitigating factors the court found that both Rebecca Corella and Faith Erwin were involved in the crime but were never charged, that the victim had engaged in an illegal act of prostitution with Rebecca Corella near the time of the offense and had solicited an act of prostitution with Faith Erwin, a minor, near the time of the offense. The court also found that the jury was instructed on the felony murder rule as well as on matters related to premeditated murder. Additionally, the court found appellant's family was supportive of him and would suffer considerable grief as a result of the imposition of the death penalty.

The trial court did consider evidence regarding appellant's change in character, but was unable to make a definitive finding on the matter. In *State v. Watson* (II), *supra*, we held that evidence revealing a substantial improvement of a defendant's character could be viewed as a mitigating factor. In the case at bench the trial court was not convinced that appellant's character had changed. We do not believe this position was unreasonable. The trial court was able to observe appellant at the resentencing hearing and listen to his testimony. The trial court was also aware appellant had been in a very controlled environment while his alleged change of character took place, with much to gain from his good behavior. Additionally the judge had evidence before him of the lifestyle appellant led before his incarceration, including the fact he was involved in another murder. These facts cast sufficient doubt upon appellant's veracity so the trial court could reasonably decline to find the proffered evidence to be a mitigating factor. The court further found

that there were no mitigating circumstances sufficiently substantial to call for leniency.

We believe the mitigation offered by appellant is not sufficiently substantial to outweigh the aggravating circumstances. Particularly we note the fact that this is not the first murder which appellant has perpetrated, as well as the gruesome manner in which this murder was committed. The death sentence is appropriate in this case.

PROPORTIONALITY REVIEW

We stated in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977), that we will conduct a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.*, 114 Ariz. at 196, 560 P.2d at 51. We have considered other cases in which the defendants robbed and murdered their victims and received the death penalty. *State v. Gretzler, supra; State v. Clark, supra; State v. Jordan, supra; State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980); *State v. Evans*, 120 Ariz. 158, 584 P.2d 1149 (1978), *sentence aff'd*, 124 Ariz. 526, 606 P.2d 16, *cert. denied*, 449 U.S. 891, 101 S.Ct. 252, 66 L.Ed.2d 119 (1980). We find that the resolution in the instant case is not disproportionate to these cases.

Appellant likens his case to *State v. Watson* (II), 129 Ariz. 60, 628 P.2d 943 (1981), where we set aside the death sentence. Both cases involve a robbery and subsequent murder. Both defendants presented as mitigation evidence of a significant change in their character for the better, and both defendants received harsher sentences than their accomplices. However, the aggravating circumstances are very different in that the offense in *Watson* was not found to be especially heinous and depraved. Moreover, the defendant in *Watson* had only one prior conviction for robbery, while appellant in the instant case

has prior convictions for both kidnapping and murder in separate incidents. Additionally, in *Watson* there were other compelling factors in mitigation—the age of the defendant (21) and the fact that the victim was armed and fired the first shot. We believe the differences in the cases are so significant that the different resolutions are necessary.

CONSTITUTIONAL CHALLENGES

Appellant challenges the constitutionality of the Arizona death penalty statute claiming the statute, on its face and in application, is violative of the eighth amendment in that it allows for arbitrary and capricious determinations. We have previously considered and rejected this issue. *State v. Gretzler, supra; State v. Blazak, supra; State v. Richmond, supra.*

The death penalty was challenged by appellant in a Rule 32 petition for post-conviction relief on the ground that in Arizona this penalty has been imposed in a manner discriminatory against black persons. This post-conviction relief was denied and we granted his petition for review which we consolidated with this appeal. In addition, appellant claims he was denied due process of law when the court refused to hold a hearing on this claim. In a similar argument appellant claims the death penalty has been visited upon poor persons and male persons in disproportionate numbers. We agree with the state's assertion that neither the federal constitution nor this court has ever required that the imposition of the death penalty precisely reflect the composition of the general population. What the United States Supreme Court has required is guidelines to bridle the discretion of the sentencing authority, thus minimizing the risk of arbitrary imposition of the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Before one is subject to the death penalty in Arizona, the state must charge him and prove him guilty beyond a reasonable doubt. Then the state must prove aggravating circumstance(s) beyond a reasonable doubt. *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825 (1980). The trial court may then find mitigating factors substantial enough to call for leniency. This court will then conduct an independent review of all matters of aggravation and mitigation to determine if the death sentence was properly imposed. *State v. Gretzler, supra; State v. Richmond, supra.* In addition, we conduct a proportionality review in every case to assure the penalty is not excessive nor disproportionate to the sentences imposed in similar cases. *State v. Gretzler, supra; State v. Richmond, supra.* These safeguards are blind to the color, wealth or sex of the defendant. We find no merit in appellant's argument.

We do not find it necessary to address appellant's last contention that the death penalty is a violation of international law.

We have examined the entire record for fundamental error, as required by A.R.S. § 13-4035, and find none.

The sentence of death is affirmed.

HAYS, J., concurs.

CAMERON, Justice, specially concurring.

I agree that the death penalty is properly imposed in this case. However, because I disagree with the majority in its holding that the crime was especially heinous and depraved, I feel that I must specially concur.

I do so not because I am insensitive to the tragic consequences of defendant's criminal conduct, but because I believe that if the death penalty statute in Arizona is to pass constitutional muster, it must be interpreted in such a way that only those who clearly come within the mandate of our legislature and the United States Supreme

Court are given this punishment. The death penalty is reserved only for those crimes which are above the norm of first degree murders, or for defendants who are above the norm of first degree murderers. *State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27-28 (1983); *State v. Watson*, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981).

The majority finds this crime to be especially heinous and depraved under A.R.S. § 13-703(F)(6), based on two of the criteria set out in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), the infliction of gratuitous violence on the victim, and the needless mutilation of the victim. I do not believe the facts of this case fit within the proper boundaries of these criteria.

The infliction of gratuitous violence was found and the death penalty imposed in *State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980), in which the defendant continued to shoot his victims after it was apparent they had been fatally wounded, and then began kicking one of the victims in the face repeatedly while the victim was already unconscious or dead. We said,

> We think that defendant's conduct in continuing his barrage of violence, inflicting wounds and abusing his victims, beyond the point necessary to fulfill his plan to steal, beyond even the point necessary to kill, is such an additional circumstance of a * * * depraved nature so as to set it apart from the 'usual or the norm.' 126 Ariz. at 40, 612 P.2d at 496, quoting *State v. Ceja*, 115 Ariz. 413, 417, 565 P.2d 1274, 1278 (1977). *See also State v. Gretzler, supra*, 135 Ariz. at 52, 659 P.2d at 11.

We similarly held that gratuitous violence was inflicted in *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (1983), where after the killing the defendant climbed on top of the corpse and beat his face repeatedly with his fists, resulting in facial wounds and bleeding. In *State v.*

Woratzeck, 134 Ariz. 452, 657 P.2d 865 (1982), we also held that gratuitous violence was employed where the defendant strangled, stabbed and bludgeoned the victim to death, and the force used by each of these three methods was sufficient to kill. The death penalty was properly imposed in both *Jeffers* and *Woratzeck*.

In the instant case the victim was killed by being run over by an automobile. The evidence adduced at trial indicates the automobile was likely backed over the victim, and then driven forward over the victim. There is no evidence to suggest that the defendant knew or should have known that the victim was dead after the first pass of the car. *Cf. State v. Gerlaugh*, 134 Ariz. 164, 654 P.2d 800 (1982) (victim still alive after defendant ran over him with his automobile several times). Therefore, unlike the defendants in *Ceja*, *Jeffers*, and *Woratzeck*, *supra*, there has been no showing that this defendant inflicted any violence on the victim which he must have known was "beyond the point necessary to kill."

The criterion of mutilation of the victim was demonstrated by *State v. Vickers*, 129 Ariz. 506, 633 P.2d 315 (1981), where the defendant strangled to death his prison cellmate and then carved the word "Bonzai" into the victim's back. Similarly in *State v. Smith*, 131 Ariz. 29, 638 P.2d 696 (1981), after suffocating the female victims the defendant proceeded to multilate their sex organs and breasts with sharp objects. The death penalty was imposed in these two cases based in part on the finding that the crime was committed in a heinous and depraved manner. The facts of these cases are in marked contrast to the present case. Here there is no suggestion of distinct acts, apart from the killing, specifically performed to multilate the victim's body. Any disfigurement of the victim in this case was the direct result of the killing itself. I do not believe we should stretch the definition of "mutilation" to cover all murders in which the victim's body is disfigured, where there is no indication of a separate purpose to multilate the corpse.

It is true, of course, that the appearance of the victim in this case was "ghastly" as the majority states. But as the United States Supreme Court has recently said in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (reversing an application of Georgia's statutory aggravating circumstance of "outrageously or wantonly vile, horrible or inhuman"),

> [I]t is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational. Id. at 433, n. 16, 100 S.Ct. at 1767, n. 16, 64 L.Ed.2d at 409, n. 16 (plurality opinion). *See also id.* at 435, 100 S.Ct. at 1768, 64 L.Ed.2d at 410-11 (Marshall, Brennan, J.J., concurring) ("[We] also agree that * * * the fact that the murder weapon was one which caused extensive damage to the victim's body is constitutionally irrelevant.")

Our statutory aggravating circumstance of a heinous or depraved killing focuses on the state of mind of the killer, *see State v. Graham*, 135 Ariz. 209, at 212, 660 P.2d 460 at 463; *State v. Jeffers*, *supra*, 135 Ariz. at 429-430, 661 P.2d at 1130-31; *State v. Zaragoza*, *supra*, 135 Ariz. at 68-69, 659 P.2d at 28-29; *State v. Gretzler*, *supra*, 135 Ariz. at 51, 659 P.2d at 10; *State v. Wortazeck*, supra, 134 Ariz. at 457, 657 P.2d at 870, not on the appearance of the corpse. Although the resulting scene was gruesome, I believe the proper application of the criteria discussed above fails to support a finding that the killer acted in a state of mind which was especially heinous or depraved. This crime is therefore not above the norm of first degree murders.

The criminal record of this defendant, however, clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and

a kidnapping, each arising in separate incidents. This history of serious violent crime justifies the imposition of the death penalty.

I concur in the opinion of the majority except its finding that this crime was heinous and depraved, and I concur in the result.

GORDON, Vice Chief Justice, concurring.

I concur in Justice Cameron's special concurrence.

FELDMAN, Justice, dissenting.

I cannot agree with that portion of the majority decision which holds that the death penalty may now be properly imposed upon the defendant.

I agree with Justice Cameron that the murder was not heinous and depraved. The remaining aggravating circumstances in this case were that defendant had been convicted of an offense for which life imprisonment or death was imposable, A.R.S. § 13-703(F)(1), and that defendant had been convicted of a felony involving the use or threat of violence, *id.* (F)(2). Both of these circumstances pertain to the character of the defendant, defining the type of murderer and serving to set the defendant apart and above the "norm" of killers. As we stated in *State v. Watson* (*Watson II*), 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981):

> [T]he death penalty should be reserved for only the most aggravating of circumstances, circumstances that are so shocking or repugnant that the murder stands out above the norm of first degree murders, *or the background of the defendant sets him apart from the usual murderer.*

(Emphasis supplied.) As Justice Cameron correctly states, the crime here does not stand out "above the norm of first degree murders"; thus, the imposition of the death penalty in this case is clearly based upon the character of the defendant.

In *Watson II*, *supra*, we held that rehabilitation evidence could and should be considered a mitigating circumstance. *Id.* at 63-64, 628 P.2d at 946-47. Thus, *Watson II* stands for the proposition that the relevant question in such cases is not limited to defendant's character at the time of the offense, but also includes his character at the time the death penalty is to be carried out.

The majority opinion indicates that the evidence of defendant's improved conduct and character was "very similar" to that presented in *Watson II*, yet concludes that the mitigation evidence offered by defendant was not sufficiently substantial to call for leniency. While defendant's prior murder conviction weighs heavily against him, in my view the rehabilitation evidence "very similar" to that presented in *Watson II* tips the balance strongly in favor of reducing defendant's sentence to life imprisonment.

At the final sentence hearing, twelve individuals offered evidence of defendant's changed character and efforts to rehabilitate himself since his imprisonment in 1974. These witnesses included several members of his family, employees of the Arizona State Prison at Florence, a fellow prisoner on death row, and a local missionary who regularly visited and corresponded with the defendant. The theme which ran through all of the testimony at the sentence hearing was that defendant had changed remarkably since he had arrived at prison six years previously. The witnesses believed that defendant's attitude had improved materially, that he had found a purpose in life and now had a genuine desire to better himself and, more important, to help others. There seemed to be no question but that this desire to help others was more than subjective; it was actually carried into effect.

There were objective facts to support these opinions. Among the objective factors which manifested the change in defendant were the following: Defendant had trans-

formed himself into a literate person, learning to read and write. He had learned to type. Witnesses testified that defendant often read three books a week and exchanged reading materials with other prisoners. Defendant had employed his new-found ability to read, write and type by using his time in prison in a constructive manner, typing numerous letters to family and friends, and studying the Bible. The counselors employed at the prison testified that defendant provided encouragement, advice and spiritual assistance to both his family and to other prisoners.

Defendant's family noted the difference in his attitude. Defendant had become settled and matured. He was honestly trying to give some meaning to his life. From prison, both in the form of letters and visits from his family, defendant assisted them with their problems, gave them advice and encouraged them. He was truly concerned for his family's welfare. The same was true for his relationship with other prisoners.

The counselors employed by the prison also testified that defendant's attempts to better and rehabilitate himself were genuine. Of course, this is a matter of opinion, but it was uncontradicted and, in light of the experience of the prison counselors, I would place great weight on their assessment.

Finally, the defendant himself testified that if given life imprisonment he understood that he would never live outside prison, because the life sentence would and should be imposed consecutively to the other sentences which he was already serving. Nevertheless, he felt that he had changed and had something worthwhile to offer others in prison society and his family if he were allowed to live. Given the current problems of our prison system, it is certainly necessary that we provide inmates with role models and assistance for rehabilitation, especially when such models are based upon changes in attitude and

religious commitment.[1] The record available to us thus leads to an overwhelming conclusion that defendant has made a sincere, successful and continued effort to change his character, rehabilitate himself and contribute in his own way to society. As the majority indicates, the trial court could not make a "definitive finding" on the question of rehabilitation. While the majority speculates that the trial court was "not convinced" that defendant's character had changed, the fact is that the trial court made no such finding. The majority states that the facts "cast sufficient doubt upon appellant's veracity so the trial court could reasonably decline to find the proffered evidence to be a mitigating factor." Again, the trial court made no such statement. In any event, the rehabilitation issue does not turn primarily upon defendant's testimony at all. There were twelve other witnesess, unimpeached and unrebutted on the issue, and the proof of change, rehabilitation and contribution to society stands uncontested in this case. Nor is this change some desperate, last-minute attempt by defendant to avoid the death penalty. The testimony indicated that the change in defendant's attitude and character manifested itself long before 1981 when *Watson II* first established that

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[1] The conclusion that because of his change in character the defendant would serve as a useful role model for other prisoners is more than mere speculation. The May, 1983 issue of *La Roca*, a magazine published by and for prisoners at the Arizona State Prison, contains an article on defendant written by Charles Doss, a prisoner who serves as editor of the magazine. In an article commencing at page 19, entitled "Death Row Revisited," Mr. Doss writes of defendant's attitude and actions when he first came to death row ten years earlier and the remarkable change which has taken place with the passage of years. The article illustrates that both inside and outside the walls of the state prison a man's life and behavior may set an example which serves as a standard for others. The article is not part of the record, but the statute provides that mitigating evidence may be considered regardless of admissibility under the rules of evidence and may consist of "any factors" relevant to defendant's character. A.R.S. § 13-703(C) and (G).

such a change was relevant in deciding whether to impose death.

Thus, the majority's conclusion on independent review that the trial court could have found defendant's changed character was not genuine, and therefore "could reasonably decline to find the proffered evidence to be a mitigating factor" is incorrect for two reasons. First, the trial court made no such finding. Second, there are no facts to support such a finding, even if it had been made. The State advances no such facts in this court, though it does not admit the change in character is genuine. Of course, it is the State's obligation to examine any purported change in character with a deservedly cynical eye. I, too, agree that it would be better if felons found God before committing their crimes rather than before being punished. It is the court's obligation, however, to recognize the possibility and principle of redemption and rehabilitation.

Further, independent review on the death penalty issue involves more than a determination of whether the trial court's imposition of this penalty can be supported by the record. It requires our own, independent conclusion from the record. *Watson II*, 129 Ariz. at 63, 628 P.2d at 946. While the aggravating circumstances which were found to exist may indicate that the defendant was above the norm of murders, the evidence of changed character is persuasive mitigation. Review of this record indicates strong evidence of rehabilitation and the probability that if allowed to live, defendant will make a contribution of some value to society. Then what is to be gained by imposing death under these circumstances? Except in the physical sense, the defendant whom we today consign to the gas chamber is not the same person who committed the crime in 1973 and was first sentenced to death in 1974. While the passage of time should not be the test, we must acknowledge that in the ten years which it has taken to reach this point, the defendant has been given

time to change. Perhaps those ten years should not have been allowed to pass, but we must remember that the statutes under which the defendant was previously sentenced to death were declared unconstitutional, *State v. Watson* (*Watson I*), 120 Ariz. 441, 586 P.2d 1253 (1978), and, as a result, defendant has been given time which he has put to good use. While quick punishment may deter, punishment of this defendant at this time serves only to illustrate that redemption and rehabilitation have no practical purpose.

Speedy imposition of the ultimate penalty might also have served the societal interest in retribution. *See Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859 (1976). But, again, the imposition of death upon a defendant who has changed so remarkably serves no valid purpose as far as retribution is concerned, because we now visit society's retribution upon a different person. Nor is society protected by imposition of the death penalty since reduction to life imprisonment would ensure that this defendant would not become eligible for parole during his lifetime. By putting this defendant to death in the face of his efforts to change and the reasonable prospect that if allowed to live he will be of value to society, we accomplish nothing but revenge. To some, especially those in the heat of anger, this may seem a sufficient reason to kill. The law should not be swayed by such emotions; it does not and cannot kill in anger; it rejects the concept of an eye for an eye and a tooth for a tooth.

The totality of the evidence offered in mitigation establishes sufficient grounds for this court to reduce defendant's sentence to life imprisonment without possibility of parole for 25 years, to be served consecutively to all other sentences. Accordingly, I dissent from the portion of the opinion which, on independent review, affirms the imposition of the death sentence.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 86-2382

WILLIE LEE RICHMOND,
Petitioner-Appellant,

v.

SAMUEL A. LEWIS,* Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,
Respondents-Appellees.

Argued and Submitted Sept. 18, 1987

Submission Vacated Sept. 22, 1987

Reargued and Submitted Sept. 27, 1990

Decided Dec. 26, 1990

As Amended on Denial of Rehearing
and Rehearing En Banc Oct. 17, 1991

As Amended Jan. 14, 1992

Before ALARCON and O'SCANNLAIN, Circuit Judges, and STEPHENS,** District Judge.

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* Samuel A. Lewis and Roger Crist have been substituted for their respective predecessors in office, James R. Ricketts and Donald Wawrzaszek, pursuant to Federal Rule of Appellate Procedure 43(c)(1).

** The Honorable Albert Lee Stephens, United States District Judge for the Central District of California, sitting by designation.

ORDER

The opinion reported at 921 F.2d 933 (9th Cir.1990) is hereby amended as follows: in the block quotation in the second column on page 943 of the opinion, twenty-two lines from the bottom of the page, delete the ellipsis and insert in lieu thereof: "In [*State v.*] *Gretzler*, [135 Ariz. 42, 659 P.2d 1 (1983)] *supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim."

The final paragraph in Part IV-D on page 947 of the opinion is hereby amended to read as follows:

In this case, there is no similar doubt. Elimination of the challenged factor would still leave enough support for Richmond's sentence because the statute at issue here is fundamentally different from the statute at issue in *Clemons* [*v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)]. The Mississippi law that *Clemons* considered authorizes the death penalty if " 'there are insufficient mitigating circumstances . . . to *outweigh* the aggravating circumstances.' ". *Id.* 110 S.Ct. at 1446 n.2 (quoting Miss.Code Ann. § 99-19-101(3)(c) (Supp. 1989)) (emphasis added). Arizona's law mandates the death penalty "if the court finds *one or more* of the [enumerated] aggravating circumstances . . . *and* that there are no mitigating circumstances *sufficiently substantial to call for leniency.*" Ariz.Rev.Stat.Ann. § 13-703 (E) (emphasis added). The difference is significant: a conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances. Invalidation of an aggravating circumstance does not mandate reweighing or require resentencing where the court has found that the prosecution has met its burden of establishing agggravation sufficient to warrant the state's harshest penalty *two or*

three times and that the defense has failed to establish mitigating circumstances sufficiently substantial to call for leniency. *See id.* §§ 13-703(C), (E). Under the statute at issue in *Clemons*, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation "weightier" or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here. Nothing in the Arizona statute suggests the need for plenary reweighing where the record still reveals that there are "one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13-703(E).

The panel has voted to deny the petition for rehearing. Judges Alarcon and O'Scannlain have voted to reject the suggestion for rehearing en banc and Judge Stephens so recommends.

On the request of a judge in regular active service, the suggestion for rehearing en banc was put to a vote of the full court, and the majority of the court voted to deny rehearing. Fed.R.App.P. 35(b). Judge Pregerson dissented from the denial of rehearing and was joined by Judges Hug, Norris and Reinhardt. The dissent is filed as an attachment to this order.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

O'SCANNLAIN, Circuit Judge:

Willie Lee Richmond, who was sentenced to death upon conviction of first-degree murder in Arizona state court, appeals from the district court's denial of his petition for habeas corpus. He contends that imposition of capital punishment will violate his rights under the sixth, eighth, and fourteenth amendments. We now affirm.

I

A

This case arises from Richmond's conviction in 1974 for first-degree murder in the death of Bernard Crummett. On an August evening seventeen years ago, the victim met Rebecca Corella, a nude dancer, at the Bird Cage Bar in Tucson, Arizona. After leaving the bar, the pair met Richmond in the bar's parking lot where Corella attempted to persuade Richmond to allow his fifteen-year-old girlfriend, Faith Erwin, to prostitute herself with Crummett. Richmond and Erwin refused, and after a brief conversation, Corella agreed to have sex with Crummett herself. Crummett thereupon produced a twenty-dollar bill, which Corella handed to Richmond and which Richmond palmed and surreptitiously exchanged for a ten. A brief argument ensued as Richmond and Corella insisted that Crummett had only given them ten dollars.

Crummett eventually yielded and agreed to pay more. As he reached into his wallet a second time, Corella observed what seemed a considerable amount of cash, and she communicated her observation to Richmond. All four individuals then proceeded in a borrowed station wagon to Corella's motel-room apartment. There, just as Corellla and Crummett emerged from the bedroom, Richmond whispered to Erwin his intention that they rob Crummett, explaining that they should not commit the crime in the apartment because Crummett might remember the surroundings.

The group then left the motel and with Richmond as their driver proceeded to the end of a road on the outskirts of Tucson. Richmond thereupon stopped the car, and either Richmond or Corella—the testimony conflicts—told Crummett to get out because the car had suffered a flat tire. Richmond then assaulted Crummett, beating him with his fists and knocking Crummett to the ground.

As Crummett lay motionless, Richmond pelted him with rocks. Corella, meanwhile, grabbed Crummett's wallet. According to Erwin, who admitted that she was vomiting and "coming down" from heroin during the incident, the following events then transpired:

> Q. [Mr. Howard, Prosecutor] Then what happened?
>
> A. [Erwin]
>
> Well, they all got in the car, and Becky [Corella] was getting the wallet and what else, you know. I looked over to see what else was taken. And Becky [Corella] was getting the wallet and we came in the car and left.
>
> Q. And where did you go from there?
>
> A. Back to the Sands Motel.
>
> Q. Did you run over anything?
>
> A. Yes, a man. It was a bump, after we were leaving.
>
> Q. After you felt that bump, was anything said in the car when you felt that bump?
>
> A. Becky [Corella] said, it felt like a man's body.
>
> Q. Who was driving the car?
>
> A. Willy [sic.]

Under cross-examination, Erwin stood by her contention that Richmond had been the driver at the time the car ran over Crummett. She admitted, however, that she was suffering greatly under the influence of her drug injections at the time and that she was lying back on the car seat with her eyes closed.

The police found Crummett's body at five o'clock the following morning. The examining pathologist testified at trial that the body exhibited signs of three forms of extreme force. First, there were wounds and indentations in the head consistent with a contention that the victim had been pummeled with rocks. In conjunction with this observation, he noted that several bloodstained rocks were found in the immediate vicinity of the body. Second, he

testified that the victim's head had suffered severe trauma and "bursting" from a crush injury most probably attributable to an automobile tire. He identified this second injury as the probable cause of death. Third, he testified to the presence of a second crush injury along the trunk and abdominal section. This too the pathologist attributed to an automobile tire, which impacted the body from the opposite direction at least thirty seconds after the fatal blow. He concluded, therefore, that the victim was twice run over—once while alive but presumably unconscious and a second time after death. A police detective also testified to the discovery of human blood and hair on the undercarriage of the recovered station wagon.

Shortly after the night of Crummett's death, Richmond was arrested on two unrelated murder charges. As he awaited proceedings on those charges in jail, he was served with an arrest warrant for the murder of Crummett, and he agreed to waive his rights and make a statement at that time. Although he admitted to robbing and beating Crummett, he claimed that he was not the driver when Crummett was run over. In his statement, which was taped and played at trial, Richmond insisted:

> I opened the door. I snatched the dude out by his collar, and bam, he falls straight out. I wanted to go through his pockets, but she [Corella] was already going through his pockets and he was getting up and I reached down and punched him again. So my old lady, Faith [Erwin], she couldn't take it. She got out of the car and she looked and she started crying, you know. And about that time I am looking at her, and going through his change. And this rock, you know, like that, and dip, dip like that, you know. And I said, wow, to myself, you know. Come on let's get in the car and me and her [Erwin] get in the car, and I am talking to her [Erwin] and Rebecca [Corella] gets in the car and she backed up and she throws up in gear and comes back over. And we

were going on down further and she was all over the fucking road, and said, give me this mother-fucking car and let me drive, you know.

At the conclusion of the evidentiary phase of the trial, the judge instructed the jury that Richmond could be convicted of first-degree murder upon either a finding of premeditation or a felony-murder theory:

> Murder is the unlawful killing of a human being, with malice aforethought.
>
> * * * *
>
> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the perpetration of, or attempt to perpetrate, the crime of robbery and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.
>
> * * * *
>
> If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all person[s] who either directly and actively commit the act constituting such crime or who knowingly and with criminal intent aid and abet its commission or, whether present or not, who advise and encourage its commission, are guilty of murder in the first-degree, whether the killing is intentional, unintentional, or accidental.

Upon these and other instructions, the jury found Richmond guilty of first-degree murder on February 5, 1974.[1]

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[1] On August 9, 1974, Richmond was convicted of first-degree murder on one of the two unrelated charges and sentenced to life imprisonment. "It is not disputed that the killing that was the basis of th[at] conviction occurred prior to the murder of Bernard Crummett." *Richmond v. Ricketts*, 640 F.Supp. 767, 780 (D.Ariz. 1986). At the time of that earlier murder, "the death [penalty] had not yet become effective [in Arizona] so that the sentence of life imprisonment was the only possible sentence." *Id.* Richmond was acquitted of the other murder. *See id.*

B

After a separate hearing held before the trial judge alone, the court pronounced its sentence:

> The court rendered a special verdict finding the existence of two aggravating circumstances: 1) that the defendant was previously convicted of a felony involving the use or a threat of violence on other persons, and 2) that the defendant had committed the offense in an especially heinous and cruel manner. It found none of the statutory mitigating circumstances to be present. Based on its findings, the court sentenced the defendant to death.

State v. Richmond, 114 Ariz. 186, 189, 560 P.2d 41, 44, *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1976).

Richmond petitioned in state court for post-conviction relief claiming the discovery of new exculpatory evidence. He presented an affidavit from Daniel McKinney, a former boyfriend of Corella, in which McKinney stated that Corella had admitted to being the driver when the car ran over Crummett. The state countered with a transcribed tape recording in which McKinney claimed that Richmond had threatened him in prison. The petition for relief was denied. On automatic appeal, the Arizona Supreme Court affirmed both the conviction and the sentence, holding inter alia that (1) Richmond's case was properly submitted on a theory of felony murder, (2) post-conviction relief was properly denied, and (3) the Arizona death penalty statute was constitutional, both as written and as applied. *See* 114 Ariz. at 190-98, 560 P.2d at 45-53.

After the United State Supreme Court denied certiorari on direct appeal, Richmond petitioned for a writ of habeas corpus in the federal district court of Arizona. He argued that the Arizona statute unconstitutionally deprived him of the opportunity to present non-statutory mitigating

circumstances before the judge at sentencing. The district court upheld Richmond's conviction but ruled the Arizona statute unconstitutional under the eighth and fourteenth amendments for its failure to allow consideration of a convict's character. *Richmond v. Cardwell*, 450 F.Supp. 519 (D.Ariz.1978). The court therefore vacated Richmond's sentence.[2]

At a second sentencing hearing in March 1980, the state trial court again found no mitigating circumstances sufficient to warrant leniency, and it resentenced Richmond to death. Once again, on mandatory appeal, the Arizona Supreme Court affirmed the sentence. *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, *cert. denied*, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983). Independently reviewing the record,[3] the state supreme court found that Richmond had actively participated in the robbery and had played an integral role in the events leading up to Crummett's death. Although it acknowledged that the force of Richmond's manual blows had not caused the death, the court held that circumstantial evidence supported Erwin's testimony that Richmond had been the lethal driver. It found that the sentence was appropriate under these conditions. Again on direct review, the United States Supreme Court denied certiorari. 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983).

Richmond then pursued a second writ of habeas corpus in federal court. After a brief hearing, the district court denied the writ and dismissed the petition. Four days later, a panel of this court stayed Richmond's execution and issued a certificate of probable cause to provide time for a full-fledged appeal. In due course, the court affirmed dismissal for failure to exhaust state remedies,

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[2] The Arizona death penalty statute was subsequently revised to cure this defect. *See* Ariz.Rev.Stat.Ann. § 13-703(G), *as amended by* 1979 Ariz.Sess.Laws ch. 144, § 1 (effective May 1, 1979).

[3] *See infra* note 10.

but it remanded with instructions to allow amendment to permit the prosecution of any claims that had been properly exhausted.[4] *Richmond v. Ricketts*, 730 F.2d 1318 (9th Cir.1984). Following such amendment, the district court again denied Richmond's petition, and this court again reversed, remanding for a full review of the state record. *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir.1985). After reviewing the full record, the district court denied Richmond's petition for the third time in a thirty-five page opinion. *Richmond v. Ricketts*, 640 F.Supp. 767 (D.Ariz.1986).

Richmond now appears before this court with the assistance of counsel to appeal this most recent denial order. This court originally entertained oral argument in his appeal on September 18, 1987, but deferred submission pending the en banc decision of this circuit in *Adamson v. Ricketts*. *See* No. 84-2069 (9th Cir. Aug. 14, 1987) (en banc) (order scheduling oral argument for Oct. 20, 1987, in light of *Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987)). *Adamson* presented a similar challenge to the constitutionality of Arizona's revised death penalty statute. A year later, in December 1988, the *Adamson* court ruled the Arizona statute unconstitutional. 865 F.2d 1011 (9th Cir.1988) (en banc). Arizona petitioned the Supreme Court of the United States for review of that decision, and this court further deferred submission pending that outcome.

In the meantime, on direct review from the state's highest court, the Supreme Court of the United States announced in *Walton v. Arizona* that the Arizona death

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[4] Under the "total exhaustion rule" announced by the Supreme Court in *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a federal court cannot adjudicate a habeas petition if it contains any unexhausted claims—even if it also contains exhausted claims. The remand order was intended to satisfy this rule. *See* 730 F.2d at 1318.

Upon amending his petition, Richmond continued to assert eighteen claims. *See* 774 F.2d at 959.

penalty statute is *not* unconstitutional. —— U.S. ——, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *reh'g denied*, —— U.S. ——, 111 S.Ct. 14, 111 L.Ed.2d 828 (1990). In a companion case decided that same day, *Lewis v. Jeffers*, the Court restated and elaborated upon its *Walton* holding. —— U.S. ——, 110 S.Ct. 3092, 111 L.Ed.2d 606, *reh'g denied*, —— U.S. ——, 111 S.Ct. 14, 111 L.Ed. 2d 829 (1990). On the following day, the Court denied certiorari in *Adamson*. *Lewis v. Adamson*, —— U.S. ——, 110 S.Ct. 3287, 111 L.Ed.2d 795 (1990), *denying cert. to Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc).

In light of these developments, this court ordered the parties to file supplemental briefs, and on September 27, 1990, the court entertained a second oral argument to consider the effects of *Walton*, *Jeffers*, and other recent Supreme Court decisions on this appeal. The court thereafter took the entire appeal under submission for decision.

II

A

The district court had proper jurisdiction under 28 U.S.C. § 2241. This court has proper jurisdiction under 28 U.S.C. § 2253. We review the denial of a habeas corpus petition de novo. *See Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir.1985). However, under 28 U.S.C. § 2254(d), the factual findings of state trial and appellate courts are presumed correct if fairly supported by the record. *See Sumner v. Mata*, 449 U.S. 539, 546-47, 101 S.Ct. 764, 768-69, 66 L.Ed.2d 722 (1981).

B

Richmond has presented four arguments: (1) that Arizona's death penalty law is unconstitutional both on its face and as applied, (2) that the trial court never specifically found that he caused, intended to cause, or attempted to cause Crummett's death and that imposition of the death penalty would therefore violate the rule of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), (3) that he was improperly denied an evidentiary hearing on his claim that Arizona's administration of the death penalty is unconstitutionally discriminatory, and (4) that fulfillment of his sentence after so many years on death row would constitute cruel and unusual punishment. Respondent Arizona has challenged all four contentions and has further argued that Richmond's petition constitutes an abuse of the writ. We address the state's latter contention first and then address Richmond's arguments sequentially.

III

In its 1978 judgment on Richmond's first petition for habeas relief, the district court vacated Richmond's sentence but affirmed his conviction. The State of Arizona argues that because Richmond failed to appeal the affirmance of his conviction at that time, it is abuse of the writ to challenge the conviction now. *See* 28 U.S.C. § 2244(b); Rules Governing Section 2254 Cases, Rule 9(b). A prior panel of this court has already addressed this contention. *See Richmond*, 774 F.2d at 959-61. We are bound to adopt its conclusions as the law of the case. *See Hondi Inv. Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir.1981); *see also* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1], at 119 (2d ed. 1988) ("If there is an appeal from the judgment entered after remand, the decision on the first appeal establishes the law of the case to be followed on the second.").

Thus, to the extent that Richmond seeks to challenge his conviction on grounds that were available to him when he filed his first petition, we agree that he is barred from doing so now:

> The relief obtained on the first petition went only to the sentence. The incentive remained, therefore,

> for Richmond to appeal the rejection of his challenges to the *underlying conviction*, since if he were to prevail on appeal on these claims, he could not be resentenced. The district court could properly decline to reconsider these underlying-conviction claims when raised in a second petition.

Richmond, 774 F.2d at 960 (emphasis in original). Whether termed abuse of the writ of res judicata, the reassertion of such claims is not permisible at this stage.

Richmond, however, has focused his attention in the current appeal on challenging the re-imposition of his sentence. This he certainly may do, and in so doing, he may challenge the death penalty on grounds that were available to him but that he did not raise when contesting his first sentence:

> Previously unadjudicated claims must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing "needless piecemeal litigation," or has raised the claims only to "vex, harass, or delay." None of these three situations applies to Richmond's petition.

Id. at 961 (citing *Sanders v. United States*, 373 U.S. 1, 18, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963)). Richmond may also renew challenges to the death penalty that were raised in his first petition and *decided against him* by the district court:

> [W]hen the district court enjoined Richmond's [initial] death sentence, it relied solely on the [original] Arizona statute's failure to consider mitigating factors of an individual's character. *Richmond v. Cardwell*, 450 F.Supp. at 526. Because Richmond had obtained the sentencing relief he sought, he had no incentive to appeal the adverse determination of his other grounds for challenging the death sentence, and perhaps would not have been permitted to do so on mootness or ripeness grounds. The ends of justice would not be served by denying Richmond appellate consideration of these other constitutional challenges to the death penalty merely because he obtained relief on a different ground.

Id. at 960. With respect to any of the proffered challenges to his sentence, therefore, "Richmond's petition does not constitute an abuse of the writ." *Id.* at 961.

IV

A

At the time of Richmond's conviction in 1974, Arizona law defined first-degree murder in relevant part as follows: "A murder which is perpetrated by . . . any . . . kind of wilful, deliberate and premeditated killing, or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery . . . is murder of the first degree." Ariz.Rev.Stat.Ann. § 13-452 (repealed 1978) (current version at § 13-1105). For those convicted of first-degree murder, the Arizona code provides a sentencing hearing independent of the trial. § 13-703 (B). Here, the trial judge must choose without the assistance of a jury between the options of life imprisonment and capital punishment. § 13-703(A)-(B). For purposes of this determination, a special verdict is required regarding the existence or non-existence of any aggravating or mitigating factors. § 13-703(D). The statute puts the burden of establishing the existence of any aggravating factors on the prosecution and the burden of establishing the existence of any mitigating factors on the defense. § 13-703(C). The statute then channels the court's discretion:

> [T]he court . . . shall impose a sentence of death if the court finds *one or more* of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

§ 13-703(E) (emphasis added).

Subsection F enumerates ten aggravating circumstances, including the following three:

> (1) The defendant was previously convicted of a felony in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
>
> (2) The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.
>
> • • • •
>
> (6) The defendant committed the offense in an especially heinous, cruel or depraved manner.

§ 13-703(F). By the time of Richmond's resentencing in 1980, subsection G of the statute had been revised to read as follows:

> Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any circumstances of the offense, including but not limited to [(1) the defendant's incapacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, (2) the defendant's suffering of unusual or substantial duress, (3) the defendant's relatively minor participation in the crime, (4) the defendant's reasonable inability to foresee that his conduct would cause or would create the grave risk of causing death, and (5) the defendant's age].

§ 13-703(G).

B

Richmond challenges the constitutionality of this revised sentencing scheme on four grounds. First, he contends that judicial determination of the existence or non-

existence of aggravating circumstances impermissibly usurps the jury's fact-finding function. Second, he claims that requiring the defense to establish the existence of any mitigating circumstances illegitimately shifts the burden of proof. Third, he argues that the Arizona statute creates an unconstitutional presumption that death is the proper sentence. Finally, he insists that imposing the death penalty upon finding that the killing was "especially heinous, cruel or depraved" is unconstitutionally vague.

The Supreme Court's recent decision in *Watson v. Arizona* specifically addressed and rejected the first three contentions, and Richmond has not forcefully advanced these arguments since.[5] With respect to the judicial determination of sentencing factors, the Court stated: "'Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.'" *Walton*, 110 S.Ct. at 3054 (quoting *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 1446, 108 L.Ed.2d 725 (1990)). Indeed, even before *Walton*, it was well settled that "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" *Id.* (quoting *Hildwin v. Florida*, 490 U.S. 638, 640, 109 S.Ct. 2055, 2057, 104 L.Ed.2d 728 (1989)); *see generally id.* 110 S.Ct. at 3054-55 (Part II of the opinion). As the district

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[5] We have already had occasion to note *Walton*'s rejection of the first and third contentions. *See Smith v. McCormick*, 914 F.2d 1153, 1169-70 (9th Cir.1990). We also note in passing that Richmond's able and experienced counsel, Timothy K. Ford, is intimately familiar with the *Walton* case. Mr. Ford represented Jeffrey Alan Walton in his petition before the United States Supreme Court. This fact—in addition to the cases' underlying similarity—may help to explain why several of the arguments raised here are identical to arguments decided by the Court in that case. *See infra* note 7 (noting the factual similarities between the two cases).

court noted when it rejected this argument in Richmond's first petition:

> "[The Supreme Court] has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

Richmond, 450 F.Supp. at 523 (quoting *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976)).[6]

The *Walton* Court likewise rejected the contention that requiring the defendant to establish the existence of mitigating factors impermissibly shifts the burden of proof. Denying that the practice violates the eighth and fourteenth amendments, the Court ruled:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating

[6] Since the *Walton* decision, Richmond has apparently conceded that the sixth amendment does not require jury factfinding at the sentencing phase in capital punishment cases, but he has stressed the alternative argument that the equal protection clause *does* require jury fact-finding at sentencing. Because Arizona law provides for jury factfinding in many similar circumstances, Richmond contends, it is arbitrary and irrational not to provide for it here. We find this argument unpersuasive. As the Supreme Court noted in *Proffitt*, there is indeed a rational reason for committing the fact-finding function to the judge at the sentencing phase in capital punishment cases, and it probably promotes more evenhanded justice to do so. *See Proffitt*, 428 U.S. at 252, 96 S.Ct. at 2966. Moreover, the Court's sixth amendment holding on this issue in *Walton* would make little sense if the broader, less specific terms of the equal protection clause could be read to require the opposite result.

> circumstances sufficiently substantial to call for leniency.

Walton, 110 S.Ct. at 3055; *see generally id.* at 3055-56 (Part III of the opinion).

Finally, the *Walton* Court also rejected the claim that the Arizona statute creates an impermissible presumption that death is the proper sentence for first-degree murder. Like Richmond, Walton had challenged the statute's directive that a court "*shall* impose a sentence of death" if it finds one or more aggravating circumstances and no substantial mitigating circumstances. Ariz.Rev. Stat.Ann. § 13-703(E) (emphasis added). Walton had contended, as Richmond does here, that this provision violates the proscription against mandatory death sentences announced in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). The Court disagreed, citing its recent decisions in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), and *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316, *reh'g denied*, —— U.S. ——, 110 S.Ct. 1961, 109 L.Ed.2d 322 (1990), both of which had upheld similarly worded capital punishment laws. The Court ruled that so long as the statute provides individualized sentencing and does not automatically impose death for certain categories of murder, it passes constitutional muster under *Woodson*. *See generally Walton*, 110 S.Ct. at 3056 (Part IV of the opinion).

In short, the Supreme Court has specifically rejected three of the constitutional arguments raised here, and it has done so in the context of reviewing the very same statute.

C

Richmond insists, however, that his fourth constitutional challenge to the statute survives *Walton*. Indeed, he contends that *Walton* itself renders his death sentence unconstitutional and that this court's en banc decision in *Adamson v. Ricketts* mandates resentencing. *See Adam-*

son, 865 F.2d 1011 (9th Cir. 1988) (en banc), *cert. denied sub nom. Lewis v. Adamson*, —— U.S. ——, 110 S.Ct. 3287, 111 L.Ed.2d 795 (1990). We are not persuaded.

In *Walton*, another Arizona inmate who was convicted of first-degree murder and sentenced to death challenged his sentence on constitutional grounds.[7] The Supreme Court denied all four of his claims and affirmed the sentence. Despite this result, Richmond contends that Walton's fourth claim and the Court's disposition of that claim bolster his petition.[8]

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[7] The facts of the *Walton* case are strikingly similar in many respects to the facts of the present case. Walton, who also acted with the assistance of two friends, "went to a bar in Tucson, Arizona, . . . intending to find and rob someone at random, steal his car, tie him up, and leave him in the desert. . . . In the bar's parking lot, the trio encountered Thomas Powell, a young, off-duty Marine." 110 S.Ct. at 3052. Forcing Powell to accompany them, the three commandeered his car and drove to a remote area on the outskirts of town. When they stopped, they

> forced Powell out of the car and had him lie face down on the ground near the car while they debated what to do with him. . . . Walton then took a .22 caliber derringer and marched Powell off into the desert. After walking a short distance, Walton forced Powell to lie down on the ground, placed his foot on Powell's neck, and shot Powell once in the head. Walton later told [his two accompanying friends] that he had shot Powell and that he had "never seen a man pee in his pants before."

Id. Despite the similarities, the circumstances of Powell's death were somewhat more gruesome than those of Crummett's:

> Powell's body was found approximately a week later. . . . A medical examiner determined that Powell had been blinded and rendered unconscious by the shot but was not immediately killed. Instead, Powell regained consciousness, apparently floundered about in the desert, and ultimately died from dehydration, starvation, and pneumonia approximately a day before his body was found.

Id.

[8] Walton's first three claims, which were also raised by Richmond, were the three claims discussed in Part IV-B above. First, Walton alleged that "every finding of fact underlying the sentencing decision must be made by a jury, not by a judge." 110 S.Ct. at 3054; *compare* Ariz.Rev.Stat.Ann. § 13-703(B). Second, he alleged that the Arizona statute unconstitutionally "imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances." 110 S.Ct. at 3055; *compare* Ariz.Rev.Stat.Ann. § 13-703(C). Third, he alleged that the Arizona statute "creates an unconstitutional presumption that death is the proper sentence" because it *requires* the death penalty "if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency." 110 S.Ct. at 3056; *compare* Ariz.Rev.Stat.Ann. § 13-703(E). The Supreme Court rejected all three of these claims as well as the fourth, which is discussed herein.

In his fourth claim, Walton alleged that the aggravating circumstance found and relied upon by the sentencing judge—his commission of the crime "in an especially heinous, cruel or depraved manner"—was unconstitutionally vague. Ariz. Rev.Stat.Ann. § 13-703(F)(6); *see* 110 S.Ct. at 3056-57. The Supreme Court agreed that the relevant statutory provision was vague but did not agree that it was unconstitutional. In essence, the Court held that facial vagueness alone does not decide the question: one must look beyond the language of the suspect provision and consider the full circumstances attending its application. Safeguards built into the sentencing scheme through other provisions—and even extra-statutory procedural safeguards—may preserve the scheme's constitutional integrity. *See generally Walton*, 110 S.Ct. at 3056-58 (Part V of the opinion).

The Court found three such safeguards within Arizona law. First, the Arizona scheme provides for sentencing by a judge, not by a jury. That fact alone distinguished *Walton* from *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), two cases relied upon by Walton in which the Supreme Court had invalidated death sentences due to similarly vague statutory definitions of aggravating circumstances.

Where a judge makes the sentencing findings there is less danger of impermissibly broad applications of statutory terms: "Trial judges are presumed to know the law and to apply it [correctly] in making their decisions." *Walton*, 110 S.Ct. at 3057.

Second, the Court found, the Arizona Supreme Court had effectively salvaged the suspect provision by affording it a "limiting definition" in the course of reviewing the trial judge's sentencing decision. What the state legislature had improvidently left out, the state supreme court properly inserted:

> The Arizona Supreme Court stated that "a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death," and that "[m]ental anguish includes a victim's uncertainty as to his ultimate fate." . . .
>
> * * * *
>
> Recognizing that the proper degree of definition of an agravating factor is not susceptible of mathematical precision, we conclude that the definition given to the "especially cruel" provision *by the Arizona Supreme Court* is constitutionally sufficient because it gives meaningful guidance to the sentencer.

Id. at 3057-58 (quoting *State v. Walton*, 159 Ariz. 571, 586, 769 P.2d 1017, 1032 (1989)) (emphasis added). By injecting this limiting definition into a sentencing process already restricted to judges, Arizona provided ample protection for Walton's constitutional rights.

> If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is *irrelevant* that the statute itself may not narrow the construction of the factor.

Id. at 3057 (emphasis added).

Third, the Court reasoned:

> [E]ven if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in *Clemons v. Mississippi*, 494 U.S. [738], 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

Id.

In his reliance on *Walton*, Richmond points out as an initial matter that the same aggravating circumstance at issue in that case was cited by the Arizona Supreme Court in its review of his death sentence. Richmond insists that the terms of this aggravating circumstance—"especially heinous, cruel or depraved"—are facially vague. He is undeniably correct; *Walton* held so explicitly. Richmond then argues, however, that whereas the Arizona Supreme Court cured this potential defect in *Walton*, it failed to do so in his case. The court, he maintains, applied no comparable "limiting construction" in its review of his sentence. This contention is empirically incorrect.

In reviewing Richmond's sentence, the Arizona Supreme Court quite clearly *did* provide a limiting construction for the admittedly vague aggravating circumstance. In fact, if anything, the state court provided a more narrowly tailored and more obviously sufficient limiting construction in Richmond's case than it did in Walton's:

> "Cruel" has been defined as "disposed to inflict pain especially in a wanton, insensate or vindictive man-

ner: sadistic." *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Cruelty involves the victim's pain or suffering before death. *State v. Gretzler*, [135 Ariz. 42, 659 P.2d 1 (1983)]; *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). The offense must be committed in an *especially* cruel, heinous or depraved manner to be considered an aggravating circumstance. *State v. Lujan*, *supra*. . . .

"Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is marked by debasement, corruption, perversion or deterioration." *State v. Knapp*, *supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler*, *supra*; *State v. Poland*, *supra*; *State v. Lujan*, *supra*. In *Gretzler*, *supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. . . .

. . . We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979).

Richmond, 136 Ariz. 312, 319, 666 P.2d 57, 64 (plurality opinion) (finding Crummett's killing especially heinous and depraved but not especially cruel);[9] *compare id. with Walton*, 159 Ariz. at 586-88, 769 P.2d at 1032-34.

As in *Walton*, the sentence in this case was (a) imposed by a trial judge presumably knowledgeable in the law, (b) thoroughly and independently reviewed by the Arizona Supreme Court, and (c) reimposed under a sufficiently limiting construction.[10] Under a fair reading of *Walton* and the record alone, therefore, Richmond's contentions must fail.

Richmond attempts to avoid this conclusion by challenging the legal accuracy of the Arizona Supreme Court's limiting construction. He cites several state court de-

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[9] Richmond argues that only two of the five Justices of the Arizona Supreme Court concurred in this portion of the court's opinion. He is correct. Two other Justices voted to affirm the sentence but on other grounds. They explicitly rejected the argument that the killing had been especially heinous and depraved. *See Richmond*, 136 Ariz. at 322-24, 666 P.2d at 67-69 (Cameron, J., concurring and Gordon, V.C.J., joining). The fifth Justice dissented altogether. *See* 136 Ariz. at 324-26, 666 P.2d at 69-71 (Feldman, J., dissenting). The fact that a majority of the court did not concur in this finding, however, does not deny that the Justices who did concur in it provided an adequate limiting construction. The relevant point is that members of the court who premised their votes on the challenged factor undertook the deliberations and analysis constitutionally required.

More importantly, Richmond's observation is irrelevant in light of the fact that *four* Justices concurred in the finding of two other aggravating circumstances, either one of which could constitutionally have justified imposition of the death penalty. *See infra* Part IV-D.

[10] *See Richmond*, 136 Ariz. at 317, 666 P.2d at 62 ("[I]n each case where the death penalty is imposed, this court conducts an independent review of the record to assure a just result. We have reviewed the record in the instant case . . ."); 136 Ariz. at 320, 666 P.2d at 65 ("In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give to each. We also independently determine the propriety of the sentence.").

cisions, most notably *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), for the proposition that the court applied a definition of the aggravating circumstance that is untenable under Arizona law. This court, however, is foreclosed from engaging in any such inquiry. A federal appellate court cannot challenge the Arizona Supreme Court on matters of Arizona law; in that realm, the authority of the state court remains supreme.

Both *Walton* and its companion case, *Lewis v. Jeffers*, —— U.S. ——, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990), support this analysis. As *Walton* pointed out, the relevant focus for this court's attention is not upon the language of the Arizona statute per se or even upon the sentencing decision of the state trial judge; rather, it is upon the constitutional legitimacy of Richmond's sentence as that sentence stands *today* after review by and exhaustion of the state court process. *See Walton*, 110 S.Ct. at 3057-58. The only question for this court is whether the *final* state result violates constitutional law so as to warrant granting a writ of habeas corpus. *Walton* requires this court to pay due deference to state judicial systems in the administration of their own criminal sanctions and to recognize both the competence and duty of state courts of general jurisdiction to enforce federal constitutional law.

Jeffers thoroughly reinforces the *Walton* rule. In *Jeffers*, the Supreme Court restated and reapplied the *Walton* holding to deny another Arizona prisoner's challenge to the legitimacy of his death sentence. Because *Jeffers* was before the Court on collateral review, the Court concluded that even greater deference was owed to the state system than the Court had urged in *Walton*, which it had heard on direct review. The Court never reached the merits of Jeffers's constitutional claims, and it certainly never approached any questions of state law; rather, the Court reached its decision upon formulation of the appropriate standard of review. Writing for the Court, Justice O'Connor explained:

> [R]espect for a state court's findings of fact and application of its own law counsels against the sort of *de novo* review undertaken by the Court of Appeals in this case. . . . Where the issue is solely whether a state court has properly found existence of a constitutionally narrowed aggravating circumstance, we have never required federal courts "to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of facts that quite reasonably—perhaps even quite plainly—fit within the statutory language."...
>
> Rather, in determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We held in *Jackson* that where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine . . . "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jeffers, 110 S.Ct. at 3102-03 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 450, 100 S.Ct. 1759, 1776, 64 L.Ed.2d 398 (1980) (White, J., dissenting) and *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979)) (emphasis in original).

In short, this court's focus must not be on the underlying sentence but on whether the *state system* in both imposing and reviewing that sentence committed an *independent* constitutional violation. To vacate Richmond's sentence, this court would have to find that there is no

rational basis in law or fact for the state supreme court's final evaluation that the circumstances warrant the sentence of death:

> [A] federal court should adhere to the *Jackson* standard even when reviewing the decision of a state appellate court that has independently reviewed the evidence, for the underlying question remains the same: if a State's aggravating circumstances adequately perform their constitutional function, then the state court's application of those circumstances raises, apart from due process and eighth amendment concerns, only a question of the proper application of state law. A state court's finding of an aggravating circumstance in a particular case—*including a de novo finding by an appellate court that a particular offense "is especially heinous . . . or depraved"*—is arbitrary or capricious if and only if no reasonable sentencer could have so concluded.

Id. 110 S.Ct. at 3103 (emphasis added).

We therefore reject Richmond's invitation to "conduct[] a *de novo*, case-by-case comparison of the facts" of various state court precedents. *Id.* at 3101. Like the Supreme Court in *Walton*, we "conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient." *Walton*, 110 S.Ct. at 3058. Applying *Jeffers*, we further conclude that under that definition a rational factfinder could indeed have found Crummett's murder heinous or depraved so as to warrant the penalty of death.

D

Even if Richmond were to prevail in his claim that the Arizona Supreme Court failed to provide a sufficiently limiting construction for the aggravating circumstance discussed above, however, his contentions would still lack merit. The Arizona Supreme Court rested its affirmance

of his sentence upon a finding of not one, but three aggravating circumstances and an insufficient showing of mitigating circumstances. *See Richmond*, 136 Ariz. at 318-21, 666 P.2d at 63-66. The second aggravating factor relied upon was Richmond's conviction for another murder six months after his initial conviction. Although this latter conviction postdated Richmond's first, "[i]t is not disputed that the killing that was the basis of th[at] conviction occurred prior to the murder of Bernard Crummett." *Richmond*, 640 F.Supp. at 780; *see supra* note 1. In any event, both convictions were duly on record by the time of Richmond's resentencing in 1980.

Furthermore, although the state supreme court explicitly found and addressed only these two aggravating circumstances, it held that "[t]he trial court correctly found three aggravating circumstances." *Richmond*, 136 Ariz. at 320, 666 P.2d at 65. The third was an entirely separate prior conviction for kidnapping—statutorily relevant for death penalty purposes as an offense "involving the use or threat of violence on another person." Ariz.Rev.Stat. Ann. § 13-703(F)(2).[11] Arizona law explicitly provides that a single aggravating circumstance may suffice for imposition of the death penalty. *See* § 13-703(E).

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[11] The court also hinted at the possible applicability of a fourth aggravating circumstance: the defendant's commission of the crime in expectation of pecuniary gain. *See* Ariz.Rev.Stat.Ann. § 13-703(F)(5); *Richmond*, 136 Ariz. at 320, 666 P.2d at 65. Although noting that the trial court had improperly analyzed this factor in reaching the conclusion that it did not apply, the Arizona Supreme Court declined to determine whether under a proper analysis it would apply.

With respect to consideration of Richmond's kidnapping conviction, the Arizona Supreme Court's majority opinion does not address it except to express general agreement with the trial court's reliance upon it. The concurrence, which was endorsed by two Justices, is somewhat more explicit in its embrace of the lower court's reliance on both the prior murder conviction *and* the prior kidnapping conviction. *See Richmond*, 136 Ariz. at 323-24, 666 P.2d at 68-69 (Cameron, J., concurring and Gordon, V.C.J., joining).

Richmond does not contend, nor could he reasonably, that the statutory definitions of these two other factors are unconstitutionally vague. *See* § 13-703(F)(1)-(2). Rather, he sidesteps consideration of these additional factors by citing this circuit's en banc decision in *Adamson v. Ricketts* for the proposition that invalidation of any one aggravating circumstance requires resentencing. *See* 865 F.2d at 1037 n.42, 1038, 1039. We have just held that the aggravating circumstance to which Richmond refers is *not* invalid, but assuming for the sake of argument that it is, Richmond's reliance on *Adamson* is not well taken.

The Supreme Court granted certiorari in *Walton* specifically *because* of this circuit's en banc holding in *Adamson*,[12] and *Walton* reached the opposite conclusion regarding the Arizona statute's constitutionality. Even if the portion of *Adamson* upon which Richmond relies survives *Walton*, it still does not support his claim. Contrary to the suggestion, *Adamson* did not hold that invalidation of one aggravating circumstance automatically requires remand for resentencing; rather, the court simply noted that it is the common practice of the Arizona Supreme Court to remand for resentencing when *that court* invalidates an aggravating circumstance. *Id.* There is no suggestion in *Adamson* that the United States Constitution requires remand when one aggravating factor is eliminated from the analysis if sufficient other aggravating factors remain.

The Supreme Court's recent decision in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d

[12] *See Walton*, 110 S.Ct. at 3054 ("Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, *see Adamson v. Ricketts*, 865 F.2d 1011 (1988) (en banc), we granted certiorari."); *id.* 110 S.Ct. at 3059 (Scalia, J., concurring) (describing *Adamson* and *Walton* as "essentially identially" cases).

725 (1990), upon which Richmond also relies, is not to the contrary. In *Clemons*, a Mississippi inmate challenged the constitutionality of a death sentence imposed partially on the basis of a court's finding that it had been an "especially heinous, atrocious or cruel" killing. *Id.* 110 S.Ct. at 1445. The Mississippi law in question permitted imposition of the death penalty upon a finding of only one aggravating circumstance so long as that aggravating circumstance outweighed all mitigating circumstances. Finding the state supreme court's consideration of the "especially heinous" factor impermissibly vague, the Supreme Court remanded for resentencing.

The Court did not hold, however, that imposition of the death penalty on the basis of the single remaining aggravating factor would have been ipso facto unconstitutional. Rather, it implicitly recognized that reliance on a single aggravating factor *can* be constitutional. *See id.* at 1446, 1450-51. The Court remanded because once the factor was removed from the analysis, it was unclear from the Mississippi Supreme Court's opinion whether the one remaining circumstance still outweighed all the mitigating evidence. *See id.* at 1449-51 (Parts III-IV of the opinion).

In this case, there is no similar doubt. Elimination of the challenged factor would still leave enough support for Richmond's sentence because the statute at issue here is fundamentally different from the statute at issue in *Clemons*. The Mississippi law that *Clemons* considered authorizes the death penalty if "'there are insufficient mitigating circumstances . . . to *outweigh* the aggravating circumstances.'" *Id.* at 1446 n.2 (quoting Miss. Code Ann. § 99-19-101(3)(c) (Supp.1989)) (emphasis added). Arizona's law mandates the death penalty "if the court *finds one or more* of the [enumerated] aggravating circumstances . . . *and* that there are no mitigating circumstances *sufficiently substantial to call for leniency*." Ariz.

Rev.Stat. Ann. § 13-703(E) (emphasis added). The difference is significant: a conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances. Invalidation of an aggravating circumstance does not mandate reweighing or require resentencing where the court has found that the prosecution has met its burden of establishing aggravation sufficient to warrant the state's harshest penalty *two or three times* and that the defense has failed to establish mitigating circumstances sufficiently substantial to call for leniency. *See id.* §§ 13-703(C), (E). Under the statute at issue in *Clemons*, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation "weightier" or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here. Nothing in the Arizona statute suggests the need for plenary reweighing where the record still reveals that there are "one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13-703(E).

V

Richmond next contends that because the trial court never specifically found that he caused, intended to cause, or attempted to cause Crummett's death, imposition of the death penalty would violate the rule of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The defendant in *Enmund* had been convicted of felony murder and sentenced to death for his involvement in the killing of two robbery victims, even though the record only suggested that he was the driver of the get-away car. In vacating Enmund's sentence, the Supreme Court held that imposition of the death penalty violates the eighth and fourteenth amendments in the absence of a specific finding by the trier of fact that the defendant

actually killed, attempted to kill, intended to kill, or contemplated that life would be taken:

> Enmund himself did not kill or attempt to kill; and, as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed.

Id. at 798, 102 S.Ct. at 3377; *see id.* at 801, 102 S.Ct. at 3378.

Enmund, however, is clearly distinguishable from the present case. The jury that convicted Richmond received instructions on both premeditated and felony murder, and the record before us clearly provides sufficient evidence for a finding that Richmond expressly intended to participate in and to facilitate that murder. Moreover, the Supreme Court's holding in *Enmund* was predicated upon the attenuated nature of the defendant's responsibility for the deaths in that case. As the Supreme Court pointed out more recently in *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127, *reh'g denied*, 482 U.S. 921, 107 S.Ct. 3201, 96 L.Ed.2d 688 (1987), *Enmund* does not stand for the blanket proposition that capital punishment is unconstitutional in cases of felony murder:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill."

> . . . [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.
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> * * * *
>
> . . . [W]e simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.

481 U.S. at 157-58, 107 S.Ct. at 1687-88 (footnote omitted).

Furthermore, in its independent review of the record in this case, the Arizona Supreme Court explicitly did consider *Enmund*, and it set forth findings sufficient to satisfy both that test and the Supreme Court's later pronouncements in *Tison:*

> Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of *Enmund.* The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. . . . There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.

> The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony.

Richmond, 136 Ariz. at 318, 666 P.2d at 63.[13]

Nor does it matter that the *Enmund* finding was made by the state supreme court rather than by the original sentencing court:

> At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution. . . .
>
> . . . [W]hen a federal habeas court reviews a claim that the death penalty has been imposed on one who has neither killed, attempted to kill, nor intended that a killing take place or lethal force be used, the court's inquiry cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made.

Cabana v. Bullock, 474 U.S. 376, 386-87, 106 S.Ct. 689, 696-97, 88 L.Ed.2d 704 (1986) (footnote omitted). Accordingly, we conclude that the Arizona courts have predicated Richmond's sentence upon a sufficent finding of criminal intent.

VI

As a black male of moderate means, Richmond next contends that the district court erred in denying his request for an evidentiary hearing upon his claim that Ari-

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[13] Interestingly, the Arizona Supreme Court conducted its *Enmund* analysis in this case before the United States Supreme Court narrowed the *Enmund* holding in *Tison.* The United States Supreme Court decided *Enmund* in 1982; the Arizona Supreme Court affirmed Richmond's sentence in 1983; and the United States Supreme Court decided *Tison* in 1987.

zona's administration of the death penalty is racially, sexually, and socio-economically discriminatory. We disagree. A habeas corpus petitioner is entitled to an evidentiary hearing both if he "alleges facts which, if proved, would entitle him to relief" and if he did not receive a full and fair evidentiary hearing on the issue in the state court. *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963); *see id.* at 312-19, 83 S.Ct. at 756-60. The facts that Richmond has alleged, even if proven, would not entitle him to relief.

In support of his request for a hearing on this issue in the district court, Richmond made an extensive proffer of what he seeks to prove:

> The proffer included that, although 15% of the victims of homicides in Arizona since 1973 have been black, every person under death sentence was convicted of killing a white victim; that [although] approximately 10% of the persons convicted of homicide in Arizona since 1973 have been women, no women are on death row. All three experts who had examined the Arizona death sentencing process from 1973 to the present [March 1987] found significant discrepancies based on the victim's race; two found evidence of discrimination based on the defendant's race, and one demonstrated significant disparities based on sex and economic status as well.

Brief for Appellant at 38-39 (citations omitted). This proffered evidence, however, is precisely the sort of generalized statistical evidence that was rejected as unactionable by the Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262, *reh'g denied*, 482 U.S. 920, 107 S.Ct. 3199, 96 L.Ed.2d 686 (1987). Even if proven, the statistical disparities to which Richmond points would be insufficient to support an inference of purposeful discrimination in his own case. To require the district court to weigh this evidence would be to suggest that Richmond's death sentence could conceivably be

invalidated solely on the basis of his physical or social affinity to other defendants who are not now before this court but who may have suffered unconstitutional discrimination in their receipt of the same sentence. This we cannot do. To prevail in challenging his sentence under the equal protection clause, Richmond "must prove that the decisionmakers in *his* case acted with discriminatory purpose." *McCleskey*, 481 U.S. at 292, 107 S.Ct. at 1767 (emphasis in original). Richmond has alleged no facts to suggest that either the Arizona Supreme Court, the state trial court, or the prosecutor's office acted with prejudicial or discriminatory purpose in either seeking or imposing his sentence. The district court thus properly denied his request for an evidentiary hearing on this issue. *See generally id.* at 292-320, 107 S.Ct. at 1766-82.

VII

Richmond's final contention is that fulfillment of his sentence after sixteen years on death row would constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments.[14] We know of no decision by either the United States Supreme Court or this circuit that has held that the accumulation of time a defendant spends on death row during the prosecution of his appeals can accrue into an independent constitutional violation, and Richmond has cited no such decision.

On the other hand, the State of Arizona has directed the court's attention to two relevant, though not controlling, precedents. In a decision affirmed two years later by

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[14] Richmond actually alleged that fulfillment of his sentence after *thirteen* years on death row would constitute cruel and unusual punishment. Because he raised that claim in his opening brief, which was filed in 1987, we have added the past three years during which we deferred submission of his appeal. We note, however, that because this appeal properly concerns Richmond's sentence only as of the date of its reimposition in 1980, the relevant period of his residency on death row is actually ten years.

the Tenth Circuit, the United States District Court for the District of Utah rejected a similar claim brought by a habeas corpus petitioner who had been on death row for ten years. *Andrews v. Shulsen*, 600 F.Supp. 408, 431 (D.Utah 1984), *aff'd*, 802 F.2d 1256 (10th Cir.1986), *cert. denied*, 485 U.S. 919, 108 S.Ct. 1091, 99 L.Ed.2d 253, *reh'g denied*, 485 U.S. 1015, 108 S.Ct. 1491, 99 L.Ed.2d 718 (1988). The court reasoned that to accept the petitioner's argument would be "a mockery of justice" given that the delay was attributable more to the petitioner's actions than to the state's. *Id.* Like Richmond, the petitioner in *Andrews* had sought "extensive and repeated review of [his] death sentence." *Id.* Arizona also points to the well-known decision of the California Supreme Court in *People v. Chessman*, in which that court rejected the same claim by an eleven-year death-row inmate. 52 Cal.2d 467, 497, 341 P.2d 679, 699 (1959), *cert. denied*, 361 U.S. 925, 80 S.Ct. 296, 4 L.Ed.2d 241, *reh'g denied*, 361 U.S. 941, 80 S.Ct. 383, 4 L.Ed.2d 362 (1960). Finally, we note the decision of the United States Supreme Court in *Harrison v. United States*, 392 U.S. 219, 221 n. 4, 88 S.Ct. 2008, 2009 n. 4, 20 L.Ed.2d 1047 (1968), which the district court cited in its rejection of this claim and which held that an eight-year delay between an arrest and sentencing was not unconstitutional where the delay resulted from the need to assure careful review of an unusually complex case. *See Richmond*, 640 F.Supp. at 803 (citing *Harrison*).

Especially in light of the relative absence of contrary precedents, we believe that the reasoning of these cases is sound. A defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights. It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death-row

inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates—less successful in their attempts to delay—would be forced to face their sentences. Such differential treatment would be far more "arbitrary and unfair" "cruel and unusual" than the current system of fulfilling sentences when the last in the line of appeals fails on the merits. We thus decline to recognize Richmond's lengthy incarceration on death row during the pendency of his appeals as substantively and independently violative of the Constitution.

VIII

For the foregoing reasons, we affirm the judgment of the district court and deny Richmond's petition for a writ of habeas corpus.

AFFIRMED.

HARRY PREGERSON, Circuit Judge, with whom Judges HUG, NORRIS and REINHARDT join, dissenting from denial of rehearing en banc:

By declining to rehear this case en banc, this court sends a man to this death without undertaking even the minimal review that the Supreme Court continues to find appropriate in habeas cases. In this case, even the most deferential review of the record reveals that no rational sentencer could have concluded that Richmond's mental state was "especially heinous," as that term is defined by the Arizona Supreme Court. The Arizona Supreme Court's conclusion that Richmond's mental state was "especially heinous" turns on the assumption that he was driving the car when it ran over the victim. The identity of the driver, however, was the subject of a credibility dispute. Neither the jury nor the trial court resolved that dispute, and the Arizona Supreme Court is incapable of resolving it rationally.

Moreover, the panel maintains that any error in finding of an aggravating circumstance is harmless because the sentencing judge concluded that the mitigating circumstances were not sufficiently substantial to call for leniency. The panel's conclusion is based on the erroneous premise that Arizona law permitted the sentencing court to arrive at such a conclusion without weighing the aggravating factors against the mitigating circumstances. *See Richmond v. Lewis*, 921 F.2d 933, 947 (9th Cir. 1990). By maintaining that Arizona's statute is not a weighing statute, the panel's opinion directly conflicts with Arizona case law and the prior decisions of this court. That case law demonstrates that in Arizona, the sentencer evaluates whether the mitigating evidence is sufficiently substantial to warrant leniency by weighing it against the aggravating factors. When an invalid aggravating factor is removed from the scales, the equation can change. Someone must reevaluate the mix of mitigating factors in light of the reduced gravity of the remaining valid aggravating factors.

I

The panel's opinion acknowledges that the "especially heinous" aggravating circumstance is unconstitutionally vague on its face, but it concludes that the Arizona Supreme Court applied a sufficiently narrow construction of the facially vague term. Once a state appellate court has articulated a constitutionally sufficient narrowing construction of a facially vague aggravating circumstance, federal courts must still review the state courts' application of that narowed definition to the facts of a particular case. That review is to be conducted under the deferential "rational factfinder" standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A state court's finding of an aggravating circumstance, including a state appellate court's finding that a murder is "especially heinous," violates the Constitution if no reasonable sentencer could have made the finding. *See Lewis v. Jeffers*, —— U.S. ——, 110 S.Ct. 3092, 3102-03, 111 L.Ed.2d 606 (1990).

In this case, no rational sentencer could have found that Richmond's mental state was "especially heinous" as that facially vague term has been narrowed by the Arizona Supreme Court. The limiting definition, as reported in the panel's opinion, requires that the sentencer make a factual finding about the defendant's mental state. "Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions." *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, 64 (Ariz.1983), *quoted in Richmond v. Lewis*, 921 F.2d 933, 943 (9th Cir.1990). In addition, the Arizona Supreme Court tells us that "heinous" means "grossly bad" or "shockingly evil." The Arizona Supreme Court applies several factors to determine whether the "especially heinous" aggravating circumstance applies. In determining in this case that Richmond's mental state was grossly bad or shockingly evil, the Arizona Supreme Court mentioned only two of those factors: the infliction of gratuitous violence on the victim and the mutilation of the corpse. I believe that by focusing solely on those two factors in this case, the Arizona Supreme Court could draw rational inferences about the mental state of only one actor: the driver of the car:

> Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found.

Id., quoted in *Richmond*, 921 F.2d at 943.

As this quotation demonstrates, the Arizona Supreme Court clearly focused on the actions of the driver when it determined that the facts warranted a finding that the killer's mental state was "especially heinous." The Arizona Supreme Court appeared to assume that Richmond was the driver. Yet neither the jury nor the sentencing court ever found that Richmond was the driver.

Indeed, the driver's identity has been vigorously disputed throughout this case. Faith Erwin provided the only testimony implicating Richmond as the fatal driver.[1] Richmond has always denied being the fatal driver, and he has witnesses to support him. In his statement to the police, Richmond said that Becky Corella backed the car up over the victim, then drove forward and ran over him again. *Richmond v. Ricketts*, 640 F.Supp. 767, 771 (D. Ariz.1986). Corella did not testify.[2] A witness for Richmond testified that Erwin earlier reported that Corella had been driving. 640 F.Supp. at 778. The jury did not determine who drove the car. Because the jury was instructed on felony murder, the jury's verdict is consistent with either version.

At the sentencing hearing, Richmond submitted additional evidence to show that Corella was the lethal driver. 640 F.Supp. at 778-79. According to affidavits signed by two witnesses, Corella admitted being the driver. Moreover, an affidavit signed by the prosecutor in the original trial stated that Corella was prepared to testify "and accept blame for the killing." *Id.*[3]

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[1] Erwin received immunity in return for her testimony. *Richmond v. Ricketts*, 640 F.Supp. 767, 792 n. 30 (D.Ariz.1986).

[2] Corella was granted immunity, but neither the prosecution nor the defense called her as a witness. *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41, 44 (1976).

[3] In discussing the procedural history of the case, the panel's opinion mentions that Richmond filed one of these affidavits in a petition for post-conviction relief. 921 F.2d at 936. It does not discuss the other affidavits.

Neither the jury, the sentencing court, nor the Arizona Supreme Court has expressly resolved the dispute over who drove the car over the victim's body. Yet the Arizona Supreme Court's conclusion that Richmond's mental state was "especially heinous" turns on the tacit assumption that he was the driver.

Just as the jury's verdict did not necessarily determine that Richmond was the driver, the trial court's finding that the murder was "especially cruel or heinous" did not turn on any finding that Richmond was the driver. Nor did it turn on any conclusion about Richmond's mental state. At the time Richmond was sentenced in 1980, the Arizona Supreme Court had not yet narrowed the definition of "especially heinous" to restrict the application of that aggravating circumstance to determinations of the defendant's mental state or attitude. The sentencing court did not explain why it concluded that the aggravating circumstance applied, nor did it assume that Richmond was driving the car when the victim was run over. The findings and special verdict of the sentencing court do not even discuss the identity of the driver.

Nevertheless, the identity of the driver was an issue on appeal to the Arizona Supreme Court. While Richmond's case was on appeal, the United States Supreme Court decided *Edmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which held that the Constitution forbids capital punishment for certain types of felony murder convictions. In *Edmund*, the Court determined that states cannot execute defendants convicted of felony murder unless they actually killed, attempted to kill, or intended that a killing occur. *See Cabana v. Bullock*, 474 U.S. 376, 378, 106 S.Ct. 689, 693, 88 L.Ed.2d 704 (1986). Richmond contended that the ruling of *Edmund* should spare him from execution.

The Arizona Supreme Court's discussion of the *Edmund* argument is the only section of the state supreme court

opinion that discusses the dispute over the driver's identity. As I read the opinion of the state supreme court, it determined that Richmond's *Edmund* argument was a loser no matter who drove the car. Even under Richmond's version of the facts, the court noted, Richmond's level of involvement in the crime was substantial enough that it satisfied *Edmund*, without regard to whether Richmond was responsible for the final lethal action. *See State v. Richmond*, 666 P.2d at 63.

Although the Arizona Supreme Court discussed the dispute over the identity of the driver, the Arizona courts resolved the *Edmund* question without determining whether or not Richmond drove the car. The Arizona Supreme Court was institutionally incapable of resolving the credibility dispute over the identity of the driver. *See Cabana v. Bullock*, 474 U.S. 376, 388 n. 5, 106 S.Ct. 689, 698 n. 5, 88 L.Ed.2d 704 (1986). Conceivably, the Arizona Supreme Court could have determined that the sentencing court actually made an *Edmund* finding, and could have further determined that such a finding was supported by the evidence. The record, however, shows that the sentencing court made no *Edmund* finding, nor did it determine whether Richmond or Corella drove the car over the victim.[4] The opinion of the panel confirms that it was the

[4] The opinion of the Arizona Supreme Court includes one sentence that suggests that the sentencing court resolved the credibility conflict and made a factual finding that Richmond drove the car. The court said that "the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim." *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, 63 (1983). This sentence suggests that the Arizona Supreme Court believed that the trial court made a finding about the driver's identity. If so, then the court was mistaken. There is simply nothing in the record to suggest that the trial judge made *any* conclusion about whether Richmond or Corella drove the car. If any state court can be said to have determined the identity of the driver, it is the Arizona Supreme Court, not the sentencing court. Yet the Arizona Supreme Court could not rationally determine whether it was Richmond or Erwin who was telling the truth.

state supreme court, not the sentencing court, that resolved the *Edmund* question. *See Richmond* 921 F.2d at 948 ("Nor does it matter that the *Edmund* finding was made by the state supreme court rather than by the original sentencing court").

In sum, although the sentencing court may have been capable of resolving the dispute over the identity of the driver, it did not do so. The factfinder in this case can only be the Arizona Supreme Court. Yet the Arizona Supreme Court could not rationally resolve this factual dispute on the basis of a cold record. *See Cabana*, 474 U.S. at 388 n. 5, 106 S.Ct. at 698 n. 5. Nevertheless, the Arizona Supreme Court's conclusion that Richmond's mental state was "especially heinous" depends on the assumption that Richmond, not Corella, deliberately drove the car over the victim's body. Applying the deferential standard articulated by the Supreme Court, I do not see how, under these circumstances, any rational factfinder could conclude that the "especially heinous" aggravating circumstance, as narrowed and defined by the Arizona Supreme Court, applied in this case.

II

Richmond was sentenced to death on the basis of three aggravating factors. Because Richmond does not challenge the application of two of those aggravating factors, the panel asserts in part IV.D. of its opinion that any error in applying the "especially heinous" aggravating circumstance is harmless. I strongly disagree. In Richmond's case, the trial court arrived at a verdict of death only after weighing the mitigating evidence against the aggravating factors. Because the ultimate sentencing determination in Arizona involves a balancing of the mitigating evidence against the aggravating factors, Arizona is a "weighing" state, as the Supreme Court used that term in *Clemens v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 1446, 1450, 108 L.Ed.2d 725 (1990). If the sen-

tencing court's balancing included a constitutionally invalid aggravating factor, the fact that the scales also contained a valid aggravating factor does not, as the panel believes, dispose of Richmond's claim. In weighing states, the rule of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), forbids such an "automatic rule of affirmance," because "it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, 110 S.Ct. at 1450. There must either be a resentencing, *see Creech v. Arave*, 928 F.2d 1481, 1489 (9th Cir.1991); *Adamson v. Ricketts*, 865 F.2d 1011, 1038-39 (9th Cir.1988) (en banc), or at a minimum, the Arizona courts must reweigh the defendant's mitigating evidence against the valid aggravating factors.

In expounding its view that any error in the finding of the "especially heinous" aggravating circumstance was harmless, the panel begins with the erroneous premise which it advances without citing any case law, that Arizona is not a weighing state. *See Richmond*, 921 F.2d at 947. That premise is simply wrong. The language of the Arizona statute, as well as the cases of this court and the Arizona Supreme Court, establish that Arizona is indeed a weighing state.

It appears that the panel misreads Arizona law simply because the statute's text does not include the word "weigh." Nevertheless, it is clear that the statute requires weighing. If the trial court finds any aggravating circumstances, it must then make findings on the existence of mitigating circumstances. It is only after the trial court has made findings on the existence of both that it must make the sentencing decision. The statute requires a sentence of death if there are any aggravating circumstances "and there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz.Rev.Stat. § 13-703(E).

Without citing any authority, the panel mistakenly concludes that the aggravating circumstances do not influence the Arizona sentencer's inquiry into whether the mitigating circumstances are sufficiently substantial. 921 F.2d at 947. On the contrary, it is clear that the trial judge determines whether the mitigating circumstances are "sufficiently substantial" by evaluating them in relation to the aggravating circumstances that exist. This is a balancing, a process of weighing.

Numerous cases of the Arizona Supreme Court confirm that the sentencer determines whether mitigating evidence is "sufficiently substantial" by weighing it against aggravating circumstances. *See, e.g., State v. Rossi*, 146 Ariz. 359, 706 P.2d 371, 379 (Ariz.1985) ("Once the trial judge finds that defendant's capacity was significantly impaired . . . a mitigating factor arises which is then weighed against any aggravating circumstances that the trial judge may find to determine whether mitigating factors are sufficiently substantial to call for leniency"); *State v. Harding*, 670 P.2d 383, 397 (Ariz.1983) ("We have described the formula of 'sufficiently substantial to call for leniency' as involving the weighing of aggravating against mitigating circumstances on the basis of the gravity of each circumstance."); *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, 13 (1983) (determining whether mitigating circumstances are sufficiently substantial involves weighing and balancing of aggravating and mitigating circumstances that are present). The Arizona Supreme Court has clearly explained that determining whether mitigating circumstances exist is distinct from the final balancing test:

> [T]he trial court acts first as the fact finder. It must consider whether the state has proven any of the aggravating factors. . . . It must also determine whether the defendant has shown mitigating circumstances. . . . After the trial court has made these findings of fact, it then engages in a balancing test

in which it determines whether the mitigating factors are sufficiently substantial to call for leniency.

State v. Leslie, 147 Ariz. 38, 708 P.2d 719, 730 (1985), *quoted in Adamson v. Ricketts*, 865 F.2d 1011, 1063 (9th Cir.1988) (en banc) (Brunetti, J., dissenting). The Arizona case law thus confirms that the panel in this case has misconstrued the operation of the Arizona statute.

The panel has not simply misinterpreted Arizona law; it has also overlooked our prior cases. Although some portions of our opinion in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir.1988) (en banc), have not survived as good law, our description of the Arizona statute remains valid. We explained that after the parties have established the existence of aggravating and mitigating circumstances, "the court must weigh the aggravating circumstance(s) against the mitigating circumstance(s)." *Id.* at 1040; *see also id.* at 1065-66 (Brunetti, J., dissenting). In *Adamson*, the State of Arizona itself acknowledged that the statute requires the sentencer to balance. *See id* at 1043.[5]

In Richmond's case, the trial court found that there were a number of mitigating circumstances. *See State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, 65 (1983). It was only by comparing them to the aggravating circumstances that the sentencer concluded that they were not sufficiently substantial to warrant leniency. If a reviewing court's analysis reduces the number of valid aggravating circumstances, it reduces the weight and gravity of the aggravating factors that the sentencer may permissibly consider. The reviewing court can no longer rely on an earlier finding that the mitigating circumstances were not sufficiently substantial to call for leniency. A new balancing must be conducted in order to determine whether the mitigating circumstances are sufficiently substantial in relation to the remaining valid aggravating factors.

[5] The panel's opinion also conflicts with our previous reading of the virtually identical language of Montana's capital sentencing statute. In Montana, as well as Arizona, the sentencer determines whether mitigating evidence is sufficiently substantial to warrant leniency by viewing it in relation to the aggravating circumstances that have been establised. *See Smith v. McCormick*, 914 F.2d 1153 (9th Cir.1990).

The panel fails to recognize that the findings of no mitigating circumstances sufficiently substantial to call for leniency is simply the end result of the balancing or weighing that the Arizona statute requires. It is not an isolated finding of fact. It depends on the nature and gravity of the aggravating circumstances. If the sentencing court weighed the mitigating circumstances against both valid and invalid aggravating circumstances, then the sentence of death cannot stand. At a minimum, there would have to be a determination whether the mitigating circumstances, when weighed against the remaining valid aggravating circumstances, were sufficiently substantial to call for leniency.

III

Because no rational sentencer could have found that the "especially heinous" aggravating factor applied, Richmond is entitled to further proceedings in the state courts. Richmond presented a considerable amount of mitigating evidence at his sentencing hearing. Indeed, one justice of the Arizona Supreme Court would have reversed the sentence of death on the strength of the mitigating evidence. *See Richmond*, 666 P.2d at 69 (Feldman, J., dissenting). Richmond is entitled to have the Arizona courts reevaluate the strength of that mitigating evidence in relation to the valid aggravating factors, with the invalid "especially heinous" factor removed from the scales.

SUPREME COURT OF THE UNITED STATES

No. 91-7094

WILLIE LEE RICHMOND,
Petitioner

v.

SAMUEL A. LEWIS, Director,
Arizona Department of Corrections, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 30, 1992